

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.11.2017

DELIVERED ON : 02.07.2018

CORAM :

THE HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE M.SUNDAR

W.A.NOS.283 AND 285 OF 2017

AND

C.M.P.NOS.4479 AND 4483 OF 2017

Tata Communications Ltd.,
through its Assistant Manager (HR)
V.Geetha
registered office at Mumbai-400 001.

.. Appellant in
W.A.No.283 of 2017

Bharti Airtel Limited,
represented by its Legal Manager,
Harish Rangarajan, 101, Oceanic Towers,
Santhome High Road, Santhome,
Chennai-600 002.

.. Appellant in
W.A.No.285 of 2017

सत्यमेव जयते
Vs.

1.Telecom Regulatory Authority of India,
Mahanagar Door Sanchar Bhawan,
Jawahar Lal Nehru Marg,
Next to Dr.Zakir Hussain College,
New Delhi-110 002.

2.Bharat Sanchar Nigam Ltd.,
rep by its Assistant General Manager (Legal),
O/o Chief General Manager Mtce.
Southern Telecom Region,
11, Link Road, Ganapathy Colony,
Guindy, Chennai-600 032.

3.Association of Competitive Telecom Operators,
601, Nirmal Towers,
26, Barakhamba Road,
Connaught Place,
New Delhi-110 001.
rep by its Authorised Signatory,
Mr.Manoj Misra.

4.Reliance Communications Ltd.,
having registered office at
H-Block, 1st Floor, Dhirabhai Ambani
Knowledge city,
Navi Mumbai-400 710.

.. Respondents in
both writ appeals.

W.A.No.283 of 2017 has been preferred under Clause 15 of Letters Patent against the final judgment and order dated 11.11.2016 passed in W.P.No.1875 of 2013.

W.A.No.285 of 2017 has been preferred under Clause 15 of Letters Patent against the final judgment and order dated 11.11.2016 passed in W.P.No.3652 of 2013.

Prayer in WP.No.1875 of 2013 and 3652 of 2013:-

Praying to call for the records of the respondent, being the International Tele communication Access to Essential Facilities at Cable Landing Stations (Amendment) Regulations (No.5 of 2007) dated 07.06.2007 as Amended by the (No.21 of 2012) dated 19.10.2012 and International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-allocation Charges Regulations 2012 (No.27 of 2012) dated 21.12.2012 and after perusing, quash the same and thereby consequentially direct the Respondent from not giving effect to the impugned regulations.

For Appellants : Mr.C.S.Vaidyanathan
Senior counsel
and Mr.Upmanyu Hazarika,
Senior counsel
for Mr.K.Harishankar
in W.A.No.283 of 2017

Mr.P.Chidambaram
Senior Counsel for Mr.Madhan Babu
in W.A.No.285 of 2017

For Respondents : Mr.P.Wilson, Senior Counsel
and Mr.Saketh Singh
for Dr.M.Devendran for R1

Mr.V.T.Gopalan, Senior counsel
for Mr.S.Udayakumar for R2

Mr.M.S.Krishnan, Senior Counsel
for M/s.Fox Mandal and Associates
for R3

Mr.Dabal Banerjee, Senior counsel
for Mr.Shubharanjani Ananth
for R4

Mr.N.Venkataraman, Senior Counsel
for M/s.Gupta & Ravi
for Intervenor

COMMON JUDGMENT

M.SUNDAR, J.

Instant intra-court appeals (two writ appeals) under Clause 15 of the Letters Patent are directed against a common order made by a learned Single Judge of this Court, being common order dated 11.11.2016 made in W.P.Nos.1875 of 2013 and 3652 of 2013. W.A.No.283 of 2017 is directed against W.P.No.1875 of 2013 and W.A.No.285 of 2017 is directed against W.P.No.3652 of 2013. We propose to dispose of both these intra-court appeals by this common order.

2 Facts that are absolutely essential for understanding and appreciating our order are set out infra under the caption 'Facts in a nutshell'.

3. Facts in a nutshell:

3(a) For the sake of brevity, clarity and convenience, following abbreviations and short forms are used in this order :

(i) 'Tata Communications Ltd.' (appellant in W.A.No.283 of 2017) is referred to as 'TATAs';

(ii) 'Bharti Airtel Ltd.', (appellant in W.A.No.285 of 2017) is referred to as 'Bharti';

(iii) 'Telecom Regulatory Authority of India' (Respondent No.1 in both writ appeals), is referred to as 'TRAI';

(iv) 'Bharat Sanchar Nigam Ltd.' (Respondent No.2 in both writ appeals) is referred to as 'BSNL';

(v) 'Association of Competitive Telecom Operators' is referred to as the 'said Association' (Respondent No.3 in both appeals);

(vi) 'Reliance Communications Ltd.' (Respondent No.4 in both writ appeals) is referred to as 'RCL';

(vii) 'Reliance Jio Info Comm Ltd.,' intervenor in both writ appeals is referred to as 'RJIL';

(viii) 'The Telecom Regulatory Authority of India Act, 1997' is referred to as 'TRAI Act';

(ix) 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007 is referred to as 'CLS Regulation';

(x) 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012 is referred to as 'CLS Amendment Regulation';

(xi) 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 is referred to as 'CLS Co-location Charges Regulation';

(xii) 'CLS Regulations', 'CLS Amendment Regulation' and 'CLS Co-location Charges Regulation' are collectively referred to as 'impugned Regulations';

(xiii) 'Cable Landing Station' and 'Cable Landing Stations' are referred to as 'CLS' and 'CLSS' respectively;

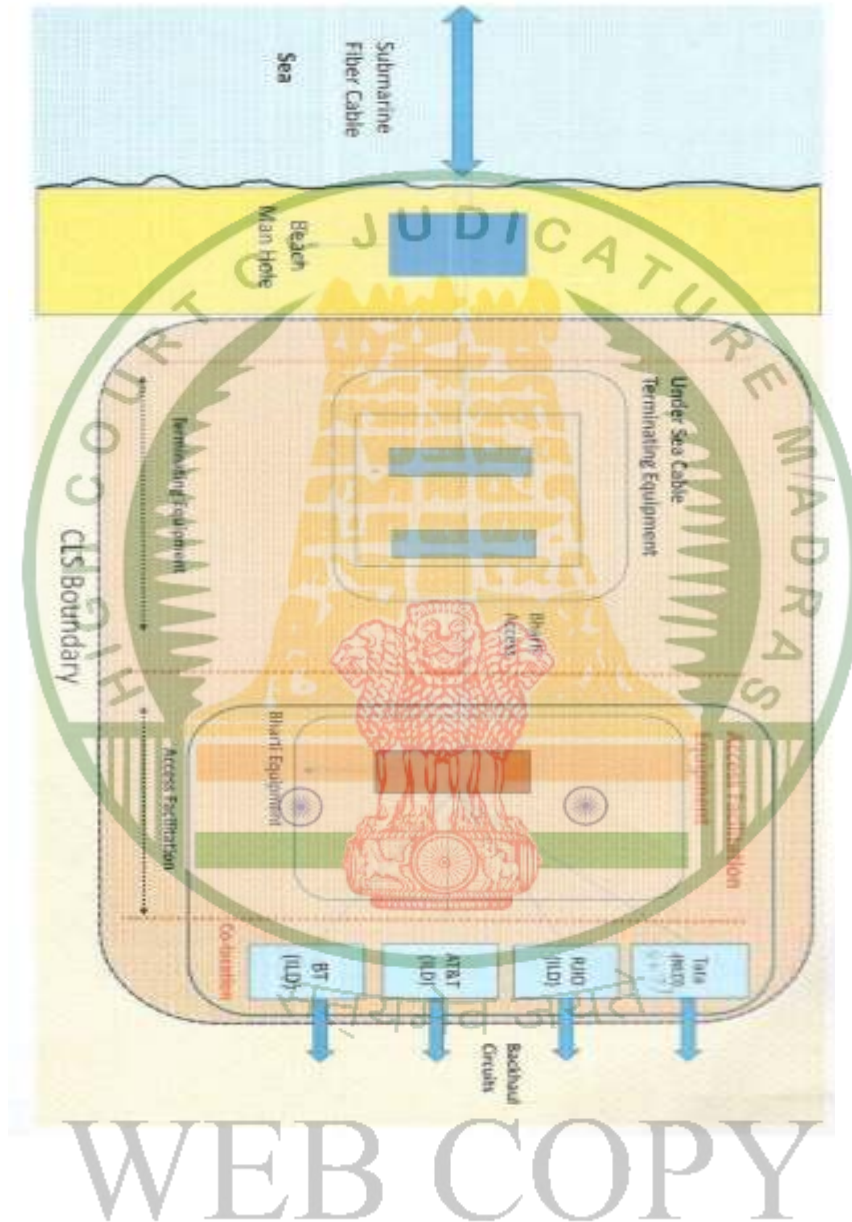
(xiv) 'Department of Telecommunications' is referred to as 'DOT'.

(xv) 'Statement of Objects and Reasons' is referred to as 'SOR'.

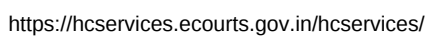
3(b) To put it in very simple terms, the entire matter pertains to a very complex technology and technical equipment by which various communication service providers in India are linked to the rest of the world by way of submarine fibre cables, which run beneath the sea.

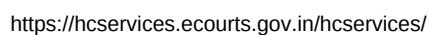
3(c) The diagrammatic depiction of this complex system as given by Bharti at the hearing is reproduced hereinbelow :

* (Refer Annexure)



3(d) On the plea that the above diagrammatic depiction may not be completely correct, TRAI has placed before us another diagrammatic depiction and we deem it appropriate to reproduce the same also. The diagrammatic depiction as given by TRAI is as follows:





3(e) What we are concerned with in the instant writ appeals are CLSs and particularly charges payable by the access seekers to owners of CLSs.

3(f) In sum and substance, the impugned Regulations regulate and fix charges payable by access seekers to the owners of CLSs.

3(g) In and by the 2007 CLS Regulations, TRAI brought in a regime of self Regulation with regard to CLS owners. To be noted, under this CLS Regulation, TRAI approved the rates that are to be charged by the CLS owners from the access seekers, but did not fix the rates. However, this CLS Regulation dated 07.06.2007 is pursuant to an amendment to licence agreement of TATAs with DOT dated 05.02.2004. We are informed that this amendment was brought in on 15.01.2007.

3(h) 2012 CLS Amendment Regulation, authorized TRAI to prescribe charges for CLSs. In other words, CLS amendment Regulation empowered TRAI to fix charges which the CLS owners can charge from their clients i.e., access seekers. From 'approving' charges, TRAI started moving towards 'fixing' charges. In effect this is the first step in moving away from a self regulatory regime.

3(i) Immediately thereafter and pursuant to the CLS Amendment Regulation, TRAI came up with CLS Co-location charges Regulation wherein and whereby the charges or in other words, the rates which CLSs can charge were fixed.

3(j) We are informed that by this CLS Co-location Charges Regulation, the charges fixed by TRAI has brought down the rates that were approved in 2007 by as much as 79% to 97%. From the submissions made before us, we notice that this is the trigger for this entire litigation.

3(k) Though self Regulation regime qua rates of CLSs were in operation from 2007, writ petitions out of which the instant writ appeals arise were filed only when the 'CLS Co-location Charges Regulation' were brought in on 21.12.2012.

3(l) Though elaborate submissions were made before us, from the submissions made, we are of the view that the entire crux and gravamen of this lis pertains to (i) competence of TRAI to make the impugned Regulations, (ii) whether the impugned Regulations have been made in conformity with obtaining

principles which flow from the evolved form of subordinate legislation making and (iii) whether the impugned Regulations are hit by the vice of manifest arbitrariness. To be noted, both (ii) and (iii) are on a demurrer qua (i). This being hypertechnical and TRAI being an expert body, scope of judicial review is also a matter of focus.

4. In the above perspective, we now proceed to discuss the submissions made before us. In the discussion infra, there will be reference to some of the case laws that were pressed into service. Those case laws, which in our view are extremely relevant, have been referred to in the course of discussion infra. However, as a large number of case laws were placed before us, we shall catalogue the case laws (including the case laws referred in the discussion infra) separately under a head Catalogue of 'Case Laws' for the sake of convenience and clarity. In other words, we are cataloguing all case laws placed before us for the sake of capturing the hearing as it unfurled, but we are discussing only those which in our considered opinion are relevant to decide the instant appeals.

5. DISCUSSION:

5(a) Opening the submissions in these intra-court appeals before us on 09.05.2017, learned senior counsel Mr.P.Chidambaram submitted that there were six grounds of attack qua impugned regulations before the learned single Judge. According to learned senior counsel Mr.P.Chidambaram, though all six grounds have been noticed by the learned single Judge, three grounds of attacks were not dealt with at all, two have been summarily dealt with and one has been brushed aside.

5(b) Learned senior counsel submitted that in the light of his aforesaid stand, all the six grounds of attack can be re-argued before this Division Bench in these intra-court appeals and that the same can be dealt with. Such a course was suggested on the basis that if this Bench agrees with the complete non-consideration / being summarily dealt with and being brushed aside pleas of the appellants, it will warrant a remand, which will be tedious and is avoidable. The respondents also agreed to such a course i.e., examining all the six grounds of attack qua impugned regulations in this intra court appeals.

5(c) Learned senior counsel further submitted that he has formulated the six grounds of attack as legal propositions and they are as follows:

i) CLS is not an 'interconnection' and therefore, it does not come within the definition of interconnection under TRAI Act and regulations thereunder, thereby rendering the impugned Regulations as Regulations made outside the scope of the parent Act i.e., TRAI Act and the Regulation making power of TRAI therein;

ii) CLS is an 'infrastructure' facility and is therefore outside the scope of Section 36 of TRAI Act (to be precise, Mr.P.Chidambaram said this is a 'brick and mortar' facility);

iii) In making the CLS Amendment Regulation and the CLS Co-location Charges Regulation in 2012, all but one objection of the appellants who are stakeholders, have not been dealt with at all by TRAI and even the one objection that was referred to has been rejected summarily. On a demurrer, it is completely contrary to the subordinate legislation making jurisprudence in its evolved form, as it stands today;

iv) On a demurrer, the impugned Regulations are completely inconsistent with Sections 36 and 11 of TRAI Act which deal with Regulation making powers of 'TRAI' and functions of TRAI respectively;

v) TRAI, being an expert body, does not denude this Court of its powers of complete and comprehensive judicial review, more so, in the light of the fact that the very competence of TRAI qua Regulation making powers is under challenge;

vi) On a demurrer, even if the impugned Regulations are construed to be intra virus the parent statute and particularly, Regulation making power of TRAI, it suffers from the vice of manifest arbitrariness.

5(d) According to learned senior counsel, with regard to the aforesaid 6 legal propositions, in the impugned order before us, legal propositions 1,2 and 3 have not been dealt with at all, whereas legal propositions 4 and 5 have been summarily dealt with and legal proposition No.6 has been overlooked / brushed aside.

5(e) Mr.C.S.Vaidyanathan, learned Senior Counsel appearing for TATAs opened his arguments by saying that submissions before the learned single Judge were made under five broad heads, but no findings or reasons have been given for substantial and large parts of the same. The five heads according to Mr.C.S.Vaidyanathan are as follows:

i) Power, competence and jurisdiction of TRAI to frame the Impugned Regulations;

ii) Whether the Regulations pass muster / rigor of Articles 14, 19(1)(g) and 19(6) of the Constitution of India;

iii) Impugned Regulations are vitiated owing to violation of transparency and natural justice;

iv) Fixation of charges overlooking jurisdictional bar, ignoring relevant factors and taking irrelevant facts into account;

v) Appellant's response to the Miscellaneous submissions advanced by the respondents;

5(f) We have perused the aforesaid 5 broad heads which have also been set out in the written submissions of TATAs.

5(g) We find that the submissions on behalf of TATAs are not very different and can fit into the 6 legal propositions set out supra. Learned senior counsel Mr.P.Chidambaram appeared leading the counsel on record for Bharti and learned senior counsel Mr.C.S.Vaidyanathan, appeared leading the counsel on record for TATAs.

5(h) In the light of the submissions being largely common and not very different from one another, for the sake of convenience, clarity, avoiding prolixity and avoiding this order becoming verbose, we deem it appropriate to proceed with the discussion under the aforesaid 6 legal propositions.

5(i) We now deal with the first legal proposition that CLS is not an 'interconnection' within the meaning of TRAI Act and the Regulations thereunder. The term 'interconnection' has not been defined in the parent Act i.e., TRAI Act. However, the term 'interconnection' has been defined in as many as 5 different Regulations made by TRAI in exercise of its Regulation making powers (under Section 36 of TRAI Act) and those 5 Regulations of TRAI are as follows:

a. The Telecommunication Interconnection (Charges and Revenue sharing) Regulation, 2001.

b. Register of Interconnect Agreement Regulation, 1999.

c. Telecommunication Interconnection (Reference Interconnect offer) Regulation, 2002.

d. The Telecommunication Interconnection Usage Charges Regulation, 2003.

e. The Telecommunication Interconnection Usage Charges (Thirteenth Amendment) Regulations, 2017."

5(j) The term 'interconnection' has a common definition in all five aforesaid Regulations. It has been defined uniformly as follows:

"Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and networks of other service providers."

5(k) In the enumeration of five different Regulations supra, the last of the five regulations being Telecommunication Interconnection Usage Charges (Thirteenth Amendment) Regulations, 2017 is 5 of 2017 and is hereinafter referred to as '5 of 2017'. Likewise in the enumeration, the fourth Regulation, i.e., Telecommunication Interconnection Usage Charges Regulation, 2003 is 4 of 2003 and is hereinafter referred to as '4 of 2003'. The term 'interconnection' has been defined in 4 of 2003. As far as 5 of 2017 is concerned, as the title itself suggests it is an amending Regulation or an amendment Regulation. 5 of 2017 is an amendment Regulation which amends 4 of 2003. We have deemed it appropriate to add 5 of 2017 also in the enumeration supra as 5 of 2017 which is an amendment regulation qua 4 of 2003 has not amended the definition of

'interconnection' occurring in 4 of 2003. In other words, the definition of 'interconnection' remains unchanged. It is to highlight the obtaining position that the definition of 'interconnection' remains unchanged right upto 2017 that 5 of 2017 also has been added in the enumeration supra though 5 of 2017 does not contain a clause defining 'interconnection'.

5(1) Alongside the term 'Interconnection', other terms such as 'Interconnection Charge', 'Interconnection Provider' and 'Interconnection Seeker' have also been defined in the Regulations made by TRAI. It may be of relevance to extract those definitions also. They are as follows:

"Interconnection charge" means the charge for interconnection levied by an interconnection provider on an interconnection seeker.

"Interconnection provider" means the service provider to whose network an interconnection is sought for providing telecommunication services.

"Interconnection Seeker" means the service provider who seeks interconnection to the network of the interconnection provider".

5(m) With regard to 5 of 2017 being an amendment Regulation, we have already explained supra the need for it to be part of aforesaid enumeration. That applies to the definitions of 'interconnection charge', 'interconnection provider' and 'interconnection Seeker' also. In addition to this, it is to be noted that the aforesaid three definitions do not find place in the Register of Interconnect Agreement Regulation, 1999, which is second of the five regulations enumerated supra.

5(n) It is the specific and categoric case of Tatas and Bharti that CLSs are merely access facilitation centres and cannot at all qualify as 'interconnection' within the meaning of TRAI Act or Regulations made thereunder. Logic behind the aforesaid argument that is being advanced by the appellants before us is that there is no connection of networks and services of one service provider to the network and services of another service provider. According to the appellants, service provided by a CLS owner is only enabling access to the band width owned by one set of eligible entities to another set of eligible entities.

5(o) It was also elaborately argued by TATAs and Bharti that a case of infrastructure sharing is completely different from interconnection. According to appellants, this is evident from a document of TRAI itself and for this purpose reliance was placed on the consultation paper and presentation given in International Telecommunication Union.

5(p) It was submitted by the appellants that in the consultation paper leading to recommendations on 16.12.2005 and another consultation paper on 13.04.2007, CLSS have been referred to as infrastructure only. There is also reference to CLSS as infrastructure sharing is their further say. It was also pointed out that in an international seminar in Hyderabad, two distinct presentations were made, one on 'interconnection' and another on 'infrastructure sharing'. According to appellant, this itself would show that TRAI by its own volition has recognized 'interconnection' and 'infrastructure sharing' as two distinct and different concepts.

5(q) In response to the aforesaid submissions on the part of Bharti and Tatas, it is the specific case of TRAI that equipments installed in CLSS constitute telegraph within the meaning of Section 3(1-AA) of Indian Telegraph Act, 1885. The very licence under which the appellants operate are under the Telegraph Act and therefore, the appellants cannot be heard to contend that CLSS are not interconnection services. It was also argued on behalf of TRAI that definition of 'interconnection' made in other Regulations cannot be telescoped into impugned Regulations. It was further submitted by TRAI that the reference in consultation papers and presentations in International Telecommunication Union are broad perspectives and the appellants cannot pick and chose a few phrases from such consultation papers and presentations to say that TRAI itself by its own volition has understood interconnection and infrastructure for access as two completely distinct and different concepts. It was further asserted that it may not be appropriate to say that CLSS are merely brick and mortar structures as there are telegraph equipments housed in these structures which connect two entities and therefore, is certainly interconnection.

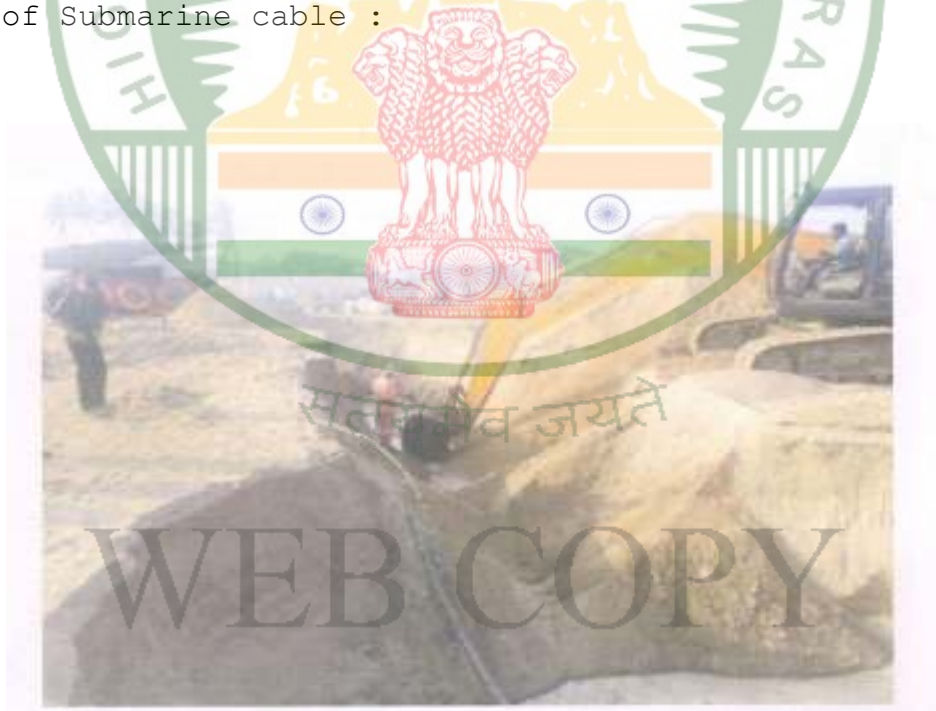
5(r) As an aid to resolve this aspect of the matter, we requested the parties at lis before us to place before us photographs and explain what exactly is contained in a CLS or in other words what exactly constitutes a CLS. We deem it appropriate to scan and put in here the undisputed photographs in this regard and they are:

* (Refer Annexure)

Submarine Cable covering at seashore :



Burying of Submarine cable :

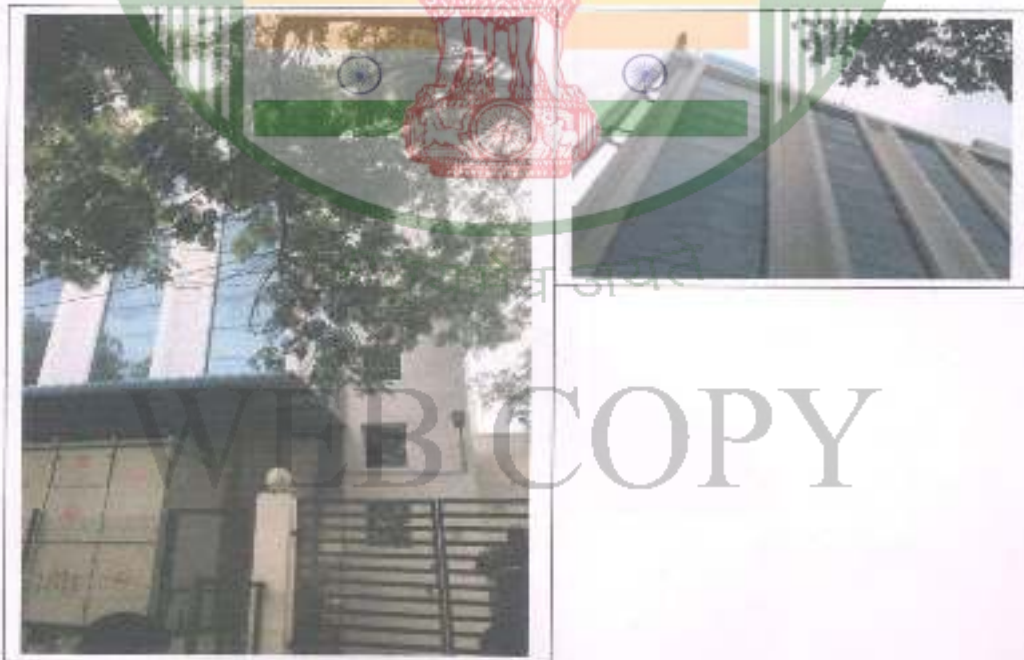


* (Refer Annexure)

Beach Main Hole (BMH) of Bay of Bengal Gateway (BBG) Cable at Chennai :

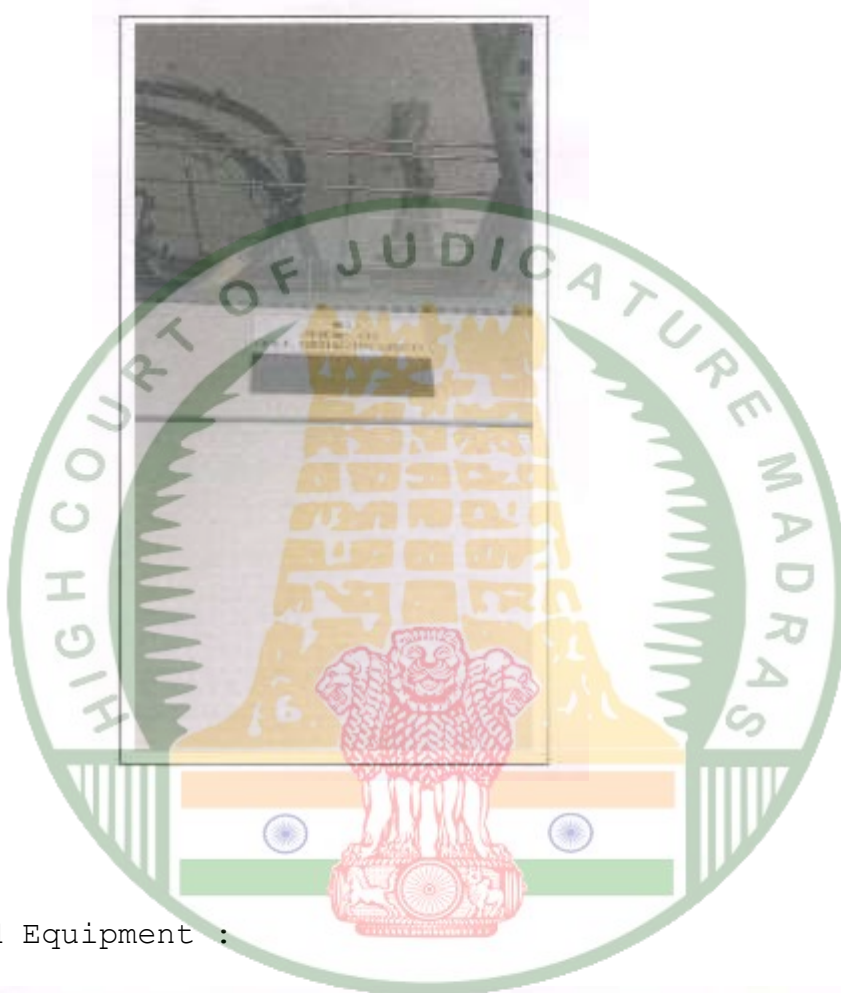


Photograph of CLS Building :



* (Refer Annexure)

Cable Termination Cubicle :



Power Feed Equipment :



* (Refer Annexure)

Optical Distribution Frame :



Digital Cross Connect (DXC) :



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* (Refer Annexure)

Inside view of a CLS :



5(s) From a perusal of the photographs placed before us (scanned and reproduced supra) and from the nature of submissions made before us, even if we go by common submissions where there are no factual contradictions, we are unable to accept that CLSs are mere brick and mortar structures as the brick and mortar structures house highly complex and technically sophisticated equipments, which will inter alia qualify as 'telegraph' within the meaning of Section 3(1-AA) of Indian Telegraph Act, 1885, though it may not be telegraph simpliciter within the meaning of that definition.

5(t) With regard to consultation papers and presentations in International Telecommunication Union, it is submitted that language deployed in such presentations and consultation papers, which are explanatory in nature, cannot be selectively picked and chosen in isolation, much less for telescoping the same as definitions into Regulations made under Regulation making powers. To be noted, these regulations, i.e., impugned regulations are undoubtedly and indisputably subordinate legislations.

5(u) We have carefully considered the rival submissions and the serious disagreement with regard to taking into account the identical definition of 'interconnection' occurring in five other Regulations under TRAI Act for the purpose of examining the impugned regulations. In our view, the clincher in this regard is a combined reading of clause 2(x) of CLS Regulation and clause 2(p) of CLS Co-location Charges Regulation. The said clauses read as follows:

Clause 2(x) of CLS Regulation :

"(x)all other words and expressions used in these regulations but not defined, and defined in the Act and the rules and other regulations made thereunder, shall have the meanings respectively assigned to them in the Act or the rules or other regulations, as the case may be."

Clause 2(p) of CLS Co-location Charges Regulation :

"(p)all other words and expressions used in these regulations but not defined, and defined in the Act and the rules and other regulations made thereunder, shall have the meanings respectively assigned to them in the Act or the rules or other regulations, as the case may be."

5(v) A combined reading of the aforesaid two clauses makes it clear that the Subordinate Legislation itself provides for taking into account the definition of certain words and expressions (words of art and in this case the word 'interconnection') in other Regulations of TRAI for the purpose of serving as definitions in Co-location charges Regulations. Therefore, we do take into account the aforesaid definition of 'interconnection' in the aforementioned 5 Regulations for the purpose of examining the impugned Regulations.

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5(w) This takes us to the next question as to whether the definition of 'interconnection' would take within its sweep CLSs. Contentions and counter contentions were made in this regard, most of which overlap with what we have set out supra with regard to whether the definition of 'interconnection' in other Regulations should be taken into account for interpreting the impugned Regulations.

5(x) A careful and close analysis of the definition of the term 'interconnection' reveals that 'interconnection' as defined is an arrangement (to be noted, the arrangement is commercial and technical) under which 'service providers' connect their equipments, networks and services to enable their customers to have access to the customers of the other.

5(y) To break it down into simpler terms, 'interconnection' is an arrangement between two entities wherein, whereby and where under the two entities connect their respective equipments, networks and services. In the instant case, CLS is one entity and access seeker is the other entity. Upto this point i.e., upto an arrangement between two entities for connecting their equipments network and services, there is no difficulty that CLS qualifies as interconnection, but the definition 'interconnection' does not end there. Going by the definition of 'interconnection', such an arrangement between two entities should be for enabling their respective customers to have access to each other.

5(z) In the instant case, the access seekers no doubt have customers and there is no difficulty about this, but for CLSs, the access seekers alone are customers and CLSs do not have customers of its own or customers who are independent of the customers of access seekers. Therefore, with regard to the same, second limb of the definition that the arrangement between the two entities should be one that enables their respective customers (i.e., customers of the two entities) to have access to each other is absent in the case of CLSs.

5(aa) We have already held that the term 'interconnection' as occurring in the CLS Regulation and CLS Co-location Charges Regulation has to necessarily be read and understood as per the definition of 'interconnection' in five other Regulations under TRAI Act (which we have alluded to supra) owing to clause 2(x) in CLS Regulation and clause 2(p) in CLS Co-location Charges Regulation. The term 'interconnection' as occurring in 5 other regulations under TRAI Act has also been extracted and reproduced supra. A very close and careful examination of the definition of the term 'interconnection' brings into focus six determinants necessary to constitute 'interconnection' and the six determinants in our reading are as follows :

- There should be two entities.
- There should be a commercial arrangement between the two entities.
- There should be a technical arrangement also between the two entities.
- The two entities should be service providers.
- The commercial and technical arrangement between the two entities (service providers) should be for connecting equipments, networks and services of the two entities (service providers).
- Such connection of equipments, networks and services of the two entities (service providers) should be for the purpose of enabling the customers of the two service providers to have access to each other.

5(ab) We examine the six determinants necessary to constitute 'interconnection', which is now a word of art qua impugned regulations in the light of our views in this regard expressed supra. To be noted, when we say 'determinants', the same can be understood as 'requirements' and/or 'ingredients' also.

5(ac) Out of the six determinants necessary to constitute interconnection, in the instant case, it could be safely said that the first five are present. There is no difficulty with regard to the first five determinants. In other words, the commercial and technical arrangements between the CLSs, who are appellants before us and their customers, who are access seekers certainly satisfy the first five determinants of interconnection set out supra. Upto this point, there is no difficulty, but the sixth determinant i.e, connection of such equipments, networks and services should be for enabling the respective customers of the two service providers to have access to each other is what presents a problem.

5(ad) The problem, which the sixth determinant presents, is that the customers of CLSs are the access seekers themselves. In other words, the CLSs do not have any customers other than the access seekers.

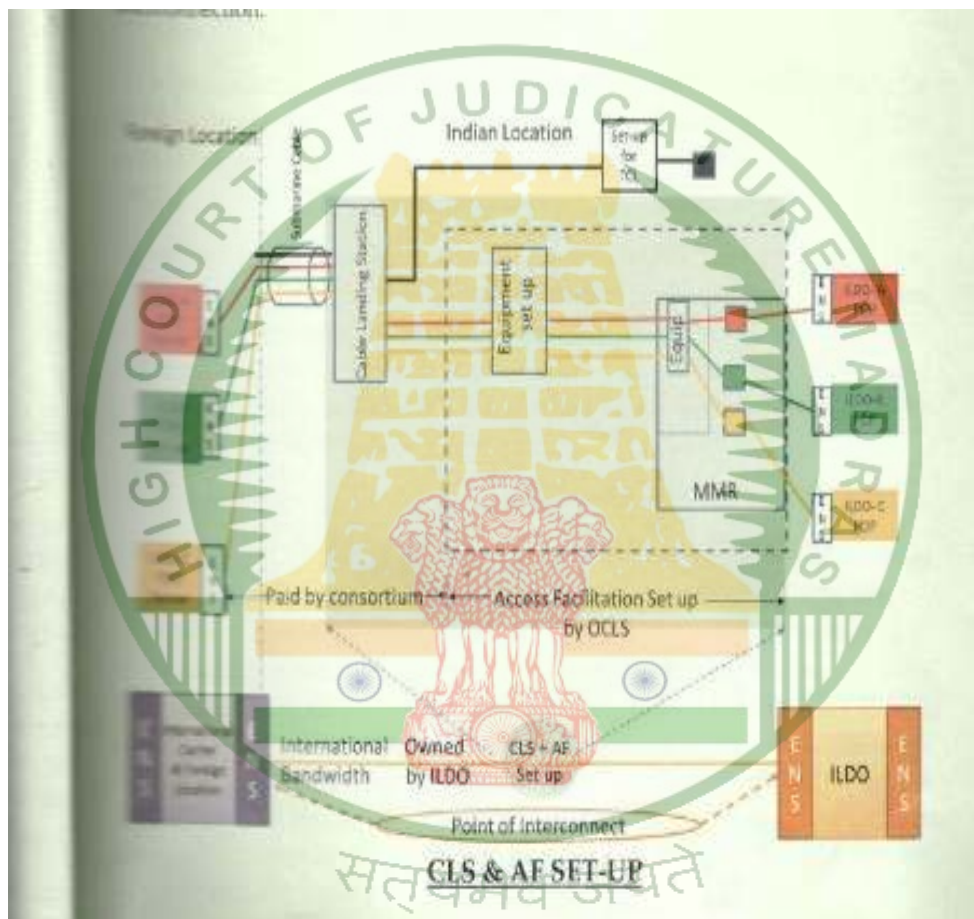
5(ae) In this regard, Mr.Venkataraman, learned senior counsel appearing for intervenor RJIL submitted that in the definition of interconnection, there is a reference to service providers. Mr.Venkataraman gave a case specific example / illustration. According to him, if we take Vodafone in India to be an access seeker qua one of the appellants herein, say TATAs' CLS for carrying its signals to another access seeker in Singapore, say Singtel, it will result in interconnection. According to him, Vodafone, an access seeker in India has customers. There is no dispute about this. Equally, Singtel, another access seeker in Singapore also has customers. It is the emphatic submission of Mr.Venkataraman that the purpose of Vodafone India, an access seeker seeking access from the CLS of TATAs is to connect with the customers of Singtel in Singapore. Therefore, when CLS of TATAs provides the aforesaid service to Vodafone India, it is effectively providing a service wherein and whereby customers of Vodafone India and the customers of Singtel Singapore get connected to each other.

5(af) Making the aforesaid illustrative submission, Mr.Venkataraman, learned senior counsel for RJIL submitted that the services provided by CLSs of the appellants herein certainly qualify as interconnection.

5(ag) At first blush, the argument appeared to be very sound and attractive. We examined the illustrative argument and sought the response of the learned senior counsel for the appellants. Learned senior counsel for the appellants pointed out that in the aforesaid illustration, the customers of Singtel in Singapore are not their customers. In other words, learned senior counsel for the appellants pointed out that while examining whether CLS is an interconnection, one has to examine the commercial and technical arrangement between TATAs' CLS and Vodafone India in the above illustration. In other words, it is their specific submission that Singtel does not come into the picture. When examining the commercial and technical arrangements between TATAs' CLS in India and Vodafone India, one has to see whether such a connection is to enable customers of Vodafone India to have access to customers of TATAs' CLS. Learned senior counsel for appellants pointed out that customer of CLS of TATA is Vodafone India only in the illustration.

* (Refer Annexure)

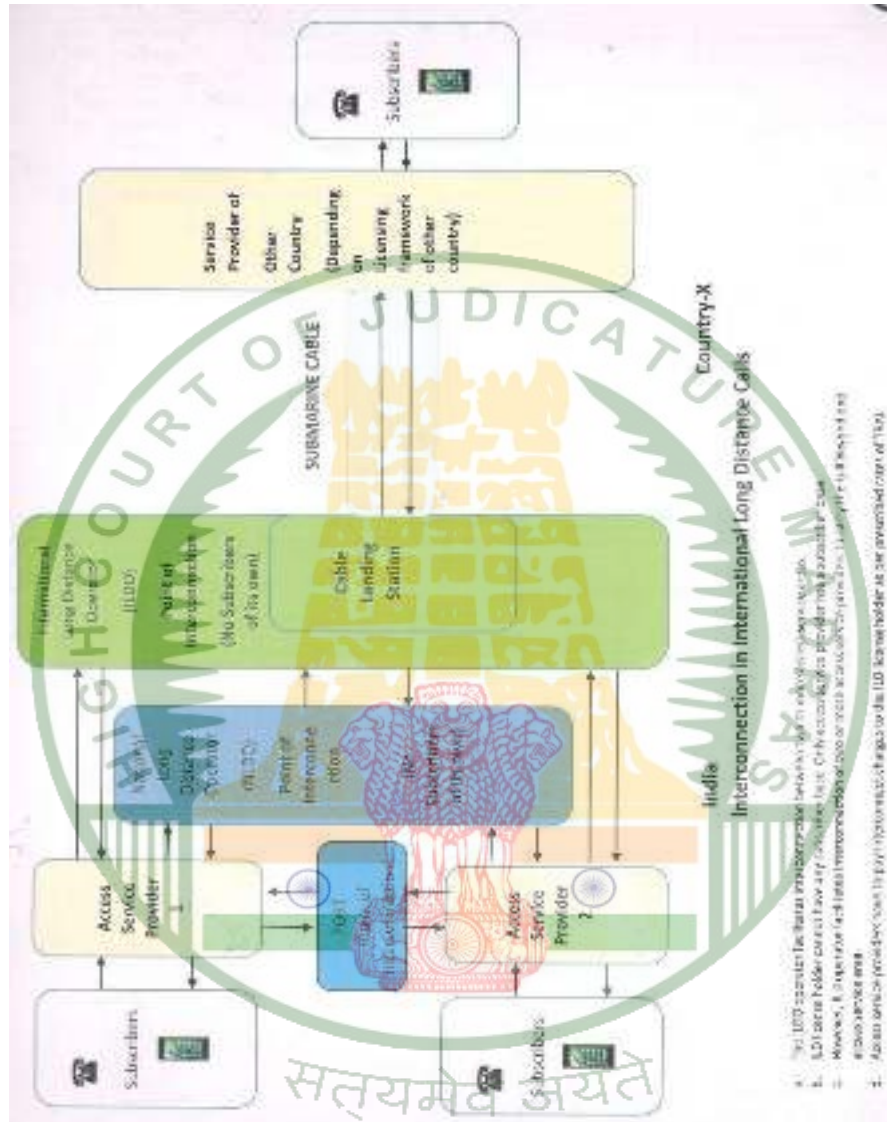
5(ah) In support of their submission, they also drew our attention to a diagrammatic depiction in this regard and the same is as follows:



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5(ai) In this regard, we deem it appropriate to extract the diagrammatic depiction given by Mr.Venkataraman, learned senior counsel appearing for RJIL. The same reads as follows :

* (Refer Annexure)



5(aj) We find a fundamental fallacy in the depiction as Vodafone India has been shown to be connecting with CLS (in the illustration) both directly and through a NLDO. This according to us is the fallacy.

5(ak) Though we found the argument of Mr.Venkataraman, at first blush to be sound and attractive, on a closer examination of the same in the light of the reply by the appellants, we have no option other than holding that the

argument is attractive, but not acceptable. The reason is, both in terms of legal technicalities and technology /engineering technicalities in the illustrative argument, the very purpose of Vodafone India seeking access from the CLS of TATAs is certainly for connecting with customers of Singtel in Singapore. Conversely, if Vodafone India does not want it's customers to connect with customers of Singtel Singapore, it would not seek access from TATAs' CLS at all. There is no difficulty in this aspect of the matter, but the 6th determinant of the term 'interconnection', which is now a word of art, is certainly absent. This whole proposition is no doubt very hypertechnical. It is certainly a hypertechnical argument, but we have no option other than going by the available definition of interconnection.

5(al) Therefore, we have no option other than agreeing with the submission of Bharti and TATAs that CLSs do not qualify as interconnection and consequently we reject the submission of TRAI that CLSs also qualify as interconnection.

5(am) Though we are holding that CLS as a facility does not qualify as interconnection within the meaning of impugned regulations, we refrain from answering Proposition No.1 on this basis alone. The reason is simple. Proposition No.1 is to the effect that impugned Regulations are outside the scope of the parent Act i.e., TRAI Act because CLS is not an interconnection. Though this rolls into one proposition, we are of the view that there can be two separate sets of answers to these two limbs of this proposition. Therefore, upto this point of this judgment, the conclusion that is being arrived at is CLS does not qualify as an interconnection which as a word of art, owing to absence of one of the six determinants. Whether this puts the impugned regulations outside the scope of parent Act (second limb of the first proposition), is a question which in our view, would be appropriate to be answered along with our conclusions and answers to proposition Nos.3 and 6, which deals with the scope of Section 36 of TRAI Act, section 36 being the Regulation making power of TRAI.

5(an) The reason is, in the light of the manner in which the submissions were made in these appeals and the manner in which they are to be dealt with, about which we have alluded to supra, the matter cannot rest here.

5(ao) We now proceed to examine the other legal propositions made on a demurrer also.

5(ap) The next legal proposition advanced before us is that CLS is only a infrastructure facility and therefore, is outside the scope of Section 36 of TRAI Act.

5(aq) While dealing with the first legal proposition, we have not accepted the brick and mortar theory. Therefore, merely because we have accepted the submissions of Bharti and TATAs that CLSSs do not qualify as interconnection, it does not follow that CLSSs are to be construed as mere infrastructure facilities. This answers proposition No.2. In other words, we hold that CLS is not a mere infrastructure facility. Similar to answer to proposition No.1, the matter does not rest here. Therefore, we examine that aspect also in testing whether it is outside the scope of Section 36 of TRAI Act. For that purpose, it may be necessary to extract Section 11 and 36 of TRAI Act, followed by SOR of TRAI Act and SOR of Amendment Act 2 of 2000 (one after the other in that sequence) which read as follows:

" 11. Functions of Authority. [(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to -

(a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely: -

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relating to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely: -

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and

the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.]

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions² [under sub-section (1) or sub-section (2)], the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

36. Power to make regulations. (1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely,-

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

(c) Omitted by Act 2 of 2000, S 14 (w.e.f 24.1.2000)

(d) matters in respect of which register is to be maintained by the Authority [under sub-clause (vii) of clause (b)] of sub-section (1) of section 11;

(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained [under sub-clause (viii) of clause (b)] of sub-section (1) of section 11;

(f) levy of fees and other charges 4 [Under clause (c)] of sub-section (1) of section 11.

SOR to TRAI Act

In the context of the National Telecom Policy, 1994 which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers' demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operator will be competing with Government Operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest.

2. In view of above, it was proposed to set up an independent Telecom Regulatory Authority as a non-statutory body and for that purpose the Indian Telegraph (Amendment) Bill, 1995 was introduced and

then passed by Lok Sabha on 6th August 1995. At the time of consideration of the aforesaid Bill in Rajya Sabha, having regard to the sentiments expressed by the Members of Rajya Sabha and of the views of the Standing Committee on Communication which expressed a hope that steps will be taken to set up a Statutory Authority, it is proposed to set up the Telecom Regulatory Authority of India as a statutory authority.

3.The proposed Authority will consist of a Chairperson and minimum two and maximum four members. A person who is or has been a Judge of the Supreme Court or Chief Justice of a High Court will be eligible to be appointed as a Chairperson of the authority. A member shall be a person who has held the post of Secretary or Additional Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a minimum period of three years.

4.The powers and functions of the Authority, inter alia, are_

(i) ensuring technical compatibility and effective inter-relationship between different service providers;

(ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(iii) ensuring compliance of licence conditions by all service providers;

(iv) protection of the interest of the consumers of telecommunication service;

(v) settlement of disputes between service providers;

(vi) fixation of rates for providing telecommunication service within India and outside India;

(vii) ensuring effective compliance of universal service obligations.

5. The Authority shall have an inbuilt dispute settlement mechanism including procedure to be followed in this regard as well as a scheme of punishment in the event of non-compliance of its order.

6. The Authority will have to maintain transparency while exercising its powers and functions. The powers and functions would enable the Authority to perform a role of watchdog for the telecom sector in an effective manner.

7. In order that the Authority functions in a truly independent manner and discharges its assigned responsibilities effectively, it is proposed to vest the Authority with a statutory status.

8. As the Parliament was not in session, the President promulgated the Telecom Regulatory Authority of India Ordinance, 1996 on the 27th January, 1996 for the aforesaid purpose.

9. The Bill seeks to replace the said Ordinance.

SOR to Amendment Act 2 of 2000-

The Telecom Regulatory Authority of India was established under the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) to regulate the telecommunication services and for matters connected therewith. During the course of the functioning of the said Authority, certain issues had come up which were hindering the growth of telecom sector. The President while addressing the joint session of Parliament on the 25th October, 1999 had stated that the Telecom Regulatory Authority of India will be strengthened to increase investor's confidence and create a level playing field between public and private operators by making suitable amendments in the Telecom Regulatory Authority of India Act, 1997. In pursuance thereof, the Central Government constituted a Group on Telecom and IT Convergence under the Chairmanship of the Finance Minister on 13.12.1999. One of the terms of references of the Group was to consider and make recommendations to the Central Government with reference to strengthening the Authority through suitable

amendments in the Telecom Regulatory Authority of India Act, 1997. The Group submitted its recommendations to the Central Government and the recommendations have been accepted by the Central Government.

2. As Parliament was not in session and in view of the urgency to remove the impediments in the growth of this basic infrastructure sector, the President was pleased to promulgate the Telecom Regulatory Authority of India (Amendment) Ordinance, 2000 on the 24th Day of January, 2000.

3. The salient features of the amendments effected by the said Ordinance are as follows:-

(i) A clear distinction has been made between the recommendatory/ advisory and the regulatory functions of the Authority as envisaged under sub-section (1) of Section 11 of the Act;

(ii) seeking of recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of Section 11(1)(a) of the Act has been made mandatory for the Central Government:

(iii) the functions of the Authority, inter alia, now include.

(a) to fix the terms and conditions of interconnectivity between services providers;

(b) to lay down the standards of quality of service to be provided by the service providers and ensure quality of service;

(c) to make recommendations on efficient management of available spectrum;

(iv) the composition of the Authority has also been changed. The Authority will now consist of a Chairperson and not more than two whole-time members and not more than two part time members to be appointed by the Central Government. The Chairperson and other members of the Authority shall be appointed from amongst persons having special knowledge of, and professional experience in, telecommunication, industry, finance, accountancy,

law, management or consumer affairs;

(v) tariff setting function of the Authority has been brought under the purview of sub-section (3) of Section 11;

(vi) further, the decisions of the Authority taken in discharge of its functions under Sections 11(1)(b), 11(2) and 13 which are appealable to the Appellate Tribunal shall not be subject to audit by the Comptroller and Auditor General of India;

(vii) new provisions have been made for establishment of a Tribunal known as the Telecom Disputes Settlement and Appellate Tribunal for adjudicating disputes between a licensor and a licensee between two or more service providers, between a service provider and a group of consumers, and also to hear and dispose of any appeals from the direction, decision or order of the Authority.

(Underlining done by Court to supply emphasis and highlight)

5(ar) To be noted, the term 'infrastructure' also has not been defined anywhere in the TRAI Act or in the impugned regulations. As alluded to supra, what we have said in answer to proposition No.1 is 'CLS is not interconnection'. It may not follow as a corollary and it is not axiomatic that CLS is an infrastructure. We have already set out supra that CLS building i.e., the concrete structure has equipment inside it which will qualify as telegraphic equipment within the meaning of Section 3(1-AA) of Indian Telegraph Act, 1885. Therefore, it becomes necessary to examine how Section 36 of TRAI Act has been dealt with by the Supreme Court. The leading case in this regard is Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others reported in (2016) 7 SCC 703, popularly known as Call Drop case. In Call Drop case, in examining Sections 36 and 11 of the TRAI Act, which deal with Regulation making power and functions of TRAI respectively, after detailed discussions, the Supreme Court in paragraphs 36 and 37 held as follows:

"36. The power to make the impugned Regulation is traceable to Section 36(1) of the Telecom Regulatory Authority of India Act, 1997. This Court in BSNL v.

Telecom Regulatory Authority of India [BSNL v. Telecom Regulatory Authority of India, (2014) 3 SCC 222] , after analysing the aforesaid provision in the backdrop of the Act held as follows: (SCC pp. 283-84 & 289-90, paras 89 & 99-100)

"89. We may now advert to Section 36. Under sub-section (1) thereof TRAI can make regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the regulations must be consistent with the TRAI Act and the rules made thereunder. There is no other restriction on the power of TRAI to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words 'without prejudice to the generality of the power under sub-section (1)' specifies various topics on which regulations can be made by TRAI. Three of these topics relate to meetings of TRAI, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by TRAI. The remaining two topics specified in clauses (e) and (f) of Section 36(2) are directly referable to Sections 11(1)(b)(viii) and 11(1)(c). These are substantive functions of TRAI. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by TRAI under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).

99. Before parting with this aspect of the matter, we may notice Sections 33 and 37. A reading of the plain language of Section 33 makes it clear that TRAI can, by general or special order, delegate to any member or officer of TRAI or any other person such of its powers and functions under the TRAI Act

except the power to settle disputes under Chapter IV or make regulations under Section 36. This means that the power to make regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the regulations made under the TRAI Act are placed on a par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by TRAI can be made ineffective or modified by Parliament and by no other body.

100. In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the Rules framed under Section 35 thereof. There is no other limitation on the exercise of power by TRAI under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13."

37. It will thus be seen that though the regulation-making power under the said Act is wide and pervasive, and is not trammelled by the provisions of Sections 11, 12(4) and 13, it is a power that is non-delegable and, therefore, legislative in nature. The exercise of this power is hedged in with the condition that it must be exercised consistently with the Act and the Rules thereunder in order to carry out the purposes of the Act. Since the regulation-making power has first to be consistent with the Act, it is necessary that it not be inconsistent with Section 11 of the Act, and in particular Section 11(1)(b) thereof. This is for the reason that the functions of the Authority are laid down by this section, and that the impugned

Regulation itself refers to Sections 11(1)(b)(i) and (v) as the source of power under which the impugned Regulation has been framed."

5(as) With regard to Call drop case, it is the specific submission of TRAI that it does not apply to the instant case and that the appellants cannot press into service the same as it is completely and clearly distinguishable on facts. According to TRAI, call drop case is a matter where there was admission on facts that 36.9% of call drops are attributable to the customers.

5(at) We have had the benefit of reading through the Call drop case and also hearing very enlightening and elucidative submissions on the same by the learned senior counsel on either side before us. To our mind, call drop case is one where the Supreme Court has examined the scope of the Regulation making power of TRAI in the light of Regulation making powers and functions of TRAI as adumbrated in Sections 36 and 11 of TRAI Act respectively and in that perspective, laid down certain principles. In the instant case also, we are clearly dealing with cases which call upon us to examine, test and answer the scope of the Regulation making powers and functions of TRAI. It is well settled that a judgment is an authority for the legal principle it lays down and not for the facts therein. We are, therefore, of the considered opinion that the submission that call drop case is distinguishable on facts and therefore not applicable to the instant case, is untenable and deserves to be rejected. We need to necessarily look at the principles regarding regulation making power of TRAI enunciated elucidatively by the Supreme Court in call drop case. We have already extracted and alluded to supra the relevant paragraphs in the call drop case.

5(au) We have extracted and reproduced Sections 11 and 36 of TRAI Act followed by SOR to TRAI Act and SOR to Amendment Act 2 of 2000 in that sequence supra in this judgment. To be noted, amendment Act 2 of 2000 is an amending Act by which several amendments and additions were made to TRAI Act, which came into force on and with effect from 24.01.2000. We have underlined some portions in the aforesaid extracts and reproduced the same supra for the sake of supplying emphasis and highlighting. In search of a conclusive answer to Proposition No.2, we examined the aforesaid four extracts. Section 36 is no doubt the soul of this matter. We have no difficulty in holding that the impugned regulations are not traceable to any of the 6 regulation making powers adumbrated in sub-section (2) of

Section 36. This takes us to sub-section (1) of Section 36. As per sub-section (1) of Section 36 TRAI can make regulations for carrying out the purposes of TRAI Act. This regulation making power of TRAI is circumscribed by requirements that such regulations should be consistent with the parent Act i.e., TRAI Act and the rules made thereunder. Now that the impugned regulations do not fall under any of the 6 categories enumerated under sub-section (2) of Section 36, we need to examine whether it qualifies as one that has been made for carrying out the purposes of TRAI Act. For this, we have to take a look at what are the purposes of TRAI Act. This takes us to Section 11 of TRAI Act. Section 11 of TRAI Act, deals with functions of TRAI. In fact, it is an enumeration of the functions of TRAI. Sub-clause (a) of sub-section (1) of Section 11 enumerates the recommendations which TRAI can make. Therefore, it deals only with the advisory role of TRAI and therefore it is not of much relevance for testing the impugned regulations. This takes us to sub-clause (b) of sub-section (1) of Section 11. Under sub-clause (b), nine different functions of TRAI have been enumerated. Out of the nine different functions, the fourth function which talks about regulating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, to our mind appeals to be the function to which the impugned regulations are traceable. This is more so when this is read in the light of / in juxtaposition with functions (i) and (iv) which essentially deal with ensuring compliance with terms and conditions of licence, fixing terms and ensuring technical compatibility between different service providers.

5(av) We see the impugned regulations as certainly a set of regulations which are intended to regulate the arrangement between CLSs on one side and access seekers on the other side, which are two sets of service providers.

5(aw) Therefore, merely because CLS in terms of its technical function does not qualify as interconnection owing to one of 6 determinants for interconnection not being satisfied will not render the entire impugned regulations outside the scope of Section 36. In addition to Section 36(1) and the relevant provision of Section 11, which have been alluded to supra, we have also found that both the SOR as well as the SOR to the amending Act clearly lay down that the objective of TRAI Act inter alia is to give power to TRAI to regulate arrangements amongst service providers.

5(ax) Further to be noted, this is not a case where interconnection as an activity and as a technology is something

which is completely alien to TRAI Act, which is covered by another statute. If interconnection were an activity or concept, which is completely covered by another statute with a separate scheme for the same, that might have impacted the drift of the conclusions. In the instant case, interconnection, which is a word of art, is very much an activity, which is well within the realm of TRAI Act, and it has been defined in as many as 5 different Regulations made under the Regulation making power of TRAI, all of which have been alluded to supra. It is not anybody's case before us that interconnection as a concept or activity is governed / covered by any other statutes.

5(ay) One more aspect which is of relevance in this context is appellants themselves have contended that the impugned regulations have become necessary owing to certain amendments to the licence. To be noted, TRAI's power to ensure compliance with terms and conditions of licence is beyond any pale of doubt. In making the aforesaid inferences we have drawn inspiration from the principles laid down by Hon'ble Supreme Court in Call Drop case, which we have alluded to supra. We have also extracted the most relevant paragraphs supra. In call drop case, the Hon'ble Supreme Court has held that the language of sub-section (2) of Section 36 of TRAI Act is not such that it controls the exercise of power by TRAI under sub-section (1) of Section 36. Therefore, taking sub-section (1) of Section 36 route to go to Section 11 is not incorrect. Other principle laid down in call drop case, is to the effect that the Regulation making power of TRAI is wide and pervasive and that Regulation will pass the test of validity qua parent Act as long as it is not inconsistent with Section 11. We have already mentioned that it is nobody's case before us that interconnection is a concept alien to TRAI Act covered by some other statute or some other regime.

5(az) Notwithstanding our answer to legal propositions 1 and 2, we move on to examine the other four legal propositions also as the propositions have been made on a demurrer without prejudice to one another and we have already set out in the preface that all the legal propositions will be examined in this judgment.

5(ba) With regard to the third legal proposition as propounded and advanced before us, it essentially means that both procedures and parameters for subordinate legislation making have been given a go by, by TRAI in making the impugned regulations and particularly CLS Co-location Charges Regulation. When we look at procedures as well as parameters for subordinate

legislation making, in its evolved form as obtaining today, in effect, we are looking at transparency and natural justice. As far as procedure is concerned, we are looking at relevant factors not being taken into account in making the CLS Co-location Charges Regulation.

5(bb) With regard to transparency, in terms of principles of natural justice, the requirement is inbuilt in Section 11(4) of TRAI Act itself. We deem it appropriate to extract Section 11(4), which reads as follows:

" 11 Functions of Authority

(1).....

PROVIDED that

PROVIDED FURTHER

PROVIDED

PROVIDED also

PROVIDED also

(2).....

PROVIDED

(3)

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions."

5(bc) This aspect of the matter was very elucidatively dealt with by the Hon'ble Supreme Court in the Call drop case, which we have referred to supra in dealing with Regulation making powers of TRAI. Transparency and principles of natural justice aspect built into Section 11(4) of TRAI Act have been very elucidatively explained and articulated by the Hon'ble Supreme Court in Paragraphs 80 to 91 of the Call drop case. Considering the importance and significance of the same, we deem it appropriate to extract all the 12 paragraphs in Call drop case i.e., Paragraphs 80 to 91 and the same read as follows:

"80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the Act. However, we find, in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that

Section 13 deals with the functions of the Airports Economic Regulatory Authority (which is an Authority which has legislative and administrative functions). "Transparency" is defined, by sub-section (4), as follows:

The Airports Economic Regulatory Authority of India Act, 2008

"13. Functions of Authority.-(1)-(3) ***

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia-

(a) by holding due consultations with all stakeholders with the airport;

(b) by allowing all stakeholders to make their submissions to the authority; and

(c) by making all decisions of the authority fully documented and explained."

81. This definition of "transparency" provides a good working test of "transparency" referred to in Section 11 (4) of the TRAI Act.

82. In fact, a judgment of the Court of Appeal in England, being *R. v. North and East Devon Health Authority, ex p Coughlan* [*R. v. North and East Devon Health Authority, ex p Coughlan*, 2001 QB 213 : (2000) 2 WLR 622 (CA)], puts the meaning of "consultation" rather well as follows: (QB p. 258 C-D, para 108)

"108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken...."

(emphasis supplied)

No doubt in the facts of the present case, the Authority did hold due consultations with all stakeholders and did allow all stakeholders to make their submissions to the Authority. However, we find no discussion or reasoning dealing with the arguments put forward by the service providers, that call drops take place for a variety of reasons, some of which are beyond the control of the service provider and are because of the consumer himself. Consequently, we find that the conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at.

83. We are cognizant of the fact that ordinarily legislative functions do not require that natural justice be followed. However, it has been recognised in some of the judgments dealing with this aspect that natural justice need not be followed except where the statute so provides.

84. In *Union of India v. Cynamide India Ltd.* [Union of India v. Cynamide India Ltd., (1987) 2 SCC 720] this Court held: (SCC pp. 734-35, para 5)

"5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing—there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate—in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity."

85. Similarly, in *M.R.F. Ltd. v. State of Kerala* [M.R.F. Ltd. v. State of Kerala, (1998) 8 SCC 227 : 1999 SCC (L&S) 1] , this Court held: (SCC p. 236, paras 23-24)

"23. The learned counsel for the appellants contended that before raising the national and festival holidays from their original number under the Parent Act to the number of days contemplated by the amending Act, the industries or their representatives should have been given an opportunity of a hearing. This argument is wholly untenable. The principles of natural justice cannot be imported in the matter of legislative action. If the legislature in exercise of its plenary power under Article 245 of the Constitution, proceeds to enact a law, those who would be affected by that law cannot legally raise a grievance that before the law was made, they should have been given an opportunity of a hearing.

24. This principle may, in limited cases, be invoked in the case of subordinate legislation specially where the main legislation itself lays down that before the subordinate legislation is made, a public notice shall be given and objections shall be invited as is usually the case, for example, in the making of municipal bye-laws. But the principle of natural justice, including the right of hearing, cannot be invoked in the making of law either by Parliament or by the State Legislature."

86. The question of transparency raises a more fundamental question, namely, that of openness in governance. We find that the Right to Information Act, 2005 has gone a long way to strengthen democracy by requiring that the Government be transparent in its actions, so that an informed citizenry is able then to contain corruption, and hold the Governments and their instrumentalities accountable to the people of India. The Preamble to the said Act, in ringing terms, states:

"... Whereas the Constitution of India has established democratic Republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

Now, therefore, it is expedient to provide for furnishing certain information to citizens who desire to have it."

(emphasis supplied)

87. We find that under Section 4(1) every public authority is not only to maintain all its records duly catalogued and indexed but is to publish, within 120 days from the enactment of the said Act, the procedure followed by it in its decision-making process, which includes channels of supervision and accountability. Section 4(1)(b)(iii) states:

"4. Obligations of public authorities.-(1) Every public authority shall-

(b) publish within one hundred and twenty days from the enactment of this Act-

(iii) the procedure followed in the decision-making process, including channels of supervision and accountability;"

88. Under Section 8, there is no obligation to give to any citizen information disclosure of which would prejudicially affect the sovereignty and integrity of India, the security of the State, etc. Subject, therefore, to well-defined

exceptions, openness in governance is now a legislatively established fact. In fact, in *Chief Information Commr. v. State of Manipur* [*Chief Information Commr. v. State of Manipur*, (2011) 15 SCC 1] , this Court had occasion to deal with the aforesaid Act in the following terms: (SCC pp. 6-9, paras 5-16)

"5. Before dealing with the controversy in this case, let us consider the object and purpose of the Act and the evolving mosaic of jurisprudential thinking which virtually led to its enactment in 2005.

6. As its Preamble shows, the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. It is clear that Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of the Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal. The Preamble would obviously show that the Act is based on the concept of an open society.

7. On the emerging concept of an "open Government", about more than three decades ago, the Constitution Bench of this Court in *State of U.P. v. Raj Narain* [*State of U.P. v. Raj Narain*, (1975) 4 SCC 428] speaking through Mathew, J. held: (SCC p. 453, para 74)

'74. ... The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. [Ed.: The Standards of Quality of Service of Basic

Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009] The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. [Ed.: The Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009] ; (Ed.: See New York Times Co. v. United States [New York Times Co. v. United States, 1971 SCC OnLine US SC 147 : 29 L Ed 2d 822 : 403 US 713 (1971)] .) To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired.'

8. Another Constitution Bench in S.P. Gupta v. Union of India [S.P. Gupta v. Union of India, 1981 Supp SCC 87] relying on the ratio in Raj Narain [State of U.P. v. Raj Narain, (1975) 4 SCC 428] held: (S.P. Gupta case [S.P. Gupta v. Union of India, 1981 Supp SCC 87] , SCC p. 275, para 67)

'67. ... The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). [Ed.: The Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009] Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. [Ed.: The Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009] The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.'

9. It is, therefore, clear from the ratio in the above decisions of the Constitution Bench of this Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19 (1)(a) of the Constitution. The said Act was, thus, enacted to consolidate the fundamental right of free speech.

10. In *Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal* [Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161] this Court also held that right to acquire information and to disseminate it is an intrinsic component of freedom of speech and expression. (See p. 213, para 43 of the Report.)

11. Again in *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd.* [Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd., (1988) 4 SCC 592] this Court recognised that the right to information is a fundamental right under Article 21 of the Constitution. This Court speaking through Sabyasachi Mukharji, J., as His Lordship then was, held: (SCC p. 613, para 34)

'34. ... We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.'

12. In *People's Union for Civil Liberties v. Union of India* [People's Union for Civil Liberties v. Union of India, (2004) 2 SCC 476] this Court reiterated, relying on the aforesaid judgments, that right to information is a facet of the right to freedom of "speech and expression" as contained in Article 19(1)(a) of

the Constitution of India and also held that right to information is definitely a fundamental right. In coming to this conclusion, this Court traced the origin of the said right from the Universal Declaration of Human Rights, 1948 and also Article 19 of the International Covenant on Civil and Political Rights, which was ratified by India in 1978. This Court also found a similar enunciation of principle in the Declaration of European Convention for the Protection of Human Rights (1950) and found that the spirit of the Universal Declaration of 1948 is echoed in Article 19(1)(a) of the Constitution. (See paras 45, 46 and 47 at pp. 494-95 of the Report.)

13. The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence, the same is a part of the jurisprudence in all the countries which are governed by the rule of law with an independent judiciary. In this connection, if we may quote what Lord Acton said in one of his speeches:

'Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.'

14. It is, therefore, clear that a society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative process of the Government itself to the sunlight of public scrutiny.

15. Frankfurter, J. also opined:

'The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilisation. "We live by symbols." The flag is the symbol of our national unity,

transcending all internal differences, however large, within the framework of the Constitution.'

16. Actually the concept of active liberty, which is structured on free speech, means sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests intimate correlation between the functioning of the Government and common man's knowledge of such functioning. (Active Liberty by Stephen Breyer, p. 15.)"

(emphasis supplied)

89. In another context also this Court has emphasised the importance of openness of governance. In *Global Energy Ltd. v. Central Electricity Regulatory Commission* [Global Energy Ltd. v. Central Electricity Regulatory Commission, (2009) 15 SCC 570], this Court stated: (SCC p. 589, para 71)

"71. The law sometimes can be written in such a subjective manner that it affects the efficiency and transparent function of the Government. If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. All law-making, be it in the context of delegated legislation or primary legislation, has to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from due process requirement under Article 21, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes."

(emphasis supplied)

90. We have been referred to the US Administrative Procedure Act, Section 553 of which states as follows: "5 USCA Section 553

553. Rule making.—(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule-making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this sub-section does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this sub-section.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
 - (2) interpretative rules and statements of policy; or
 - (3) as otherwise provided by the agency for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

91. In *Corpus Juris Secundum* (March 2016 Update) it is stated:

"Under the informal rule-making requirements of the Federal Administrative Procedure Act, after a federal administrative agency considers the relevant matter presented, it must incorporate in the rules adopted a concise general statement of their basis and purpose. The purpose of the requirement is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's actions. The requirement is a means of holding an agency accountable for administering the laws in a responsible manner, free from arbitrary conduct. The statement is not intended to be an abstract explanation addressed to an imaginary complaint but is intended, rather, to respond in a reasoned manner to the comments received, to explain how the agency resolved the significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. The statement must identify what major issues of policy were ventilated and why the agency reacted to them as it did and should enable a reviewing court to ascertain such matters. The statement must respond to the major comments received, explain how they affected the regulation, and, where an old regulation is being replaced, explain why the old regulation is no longer desirable.

Agencies have a good deal of discretion in expressing the basis of a rule. The requirement is not to be interpreted over literally, but it should not be stretched into a mandate to refer to all specific issues raised in the comments on the proposed regulations. Although an agency must genuinely consider comments it receives from interested

parties, there is no requirement that an agency discuss in great detail all comments, especially those which are frivolous or repetitive. Although the agency need not address every comment received, it must respond in a reasoned manner to those that raise significant problems, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. Conclusory statements will not fulfil the administrative agency's duty to incorporate in adopted rules a concise general statement of their basis and purpose. The agency must articulate a satisfactory explanation for its action, including a rational connection between the facts it found and the choices it made. Under some circumstance, agencies must identify specific studies or data that they rely upon in arriving at their decision to adopt a rule.

Regulations which lack a statement of basis and purpose may be upheld if the basis and purpose are obvious. Moreover, the failure of an agency to incorporate the statement does not render a rule ineffective as to parties to litigation who had knowledge of the rule.

Despite the statutory language mandating that the statement of basis of purposes be 'incorporate[d] in the rules adopted,' the statement of basis and purpose does not have to be published at precisely the same moment as the rules. Rather, the rules and statement need only be published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes, the rules."

(emphasis supplied)

5(bd) Suffice to say that we are examining this case in the light of the dicta/ratio laid down by the Supreme Court in the Call drop case and particularly in the aforesaid paragraphs i.e., Paragraph Nos.80 to 91. There is also a specific reference to corpus juris secundum in the call drop case pertaining to subordinate legislation making, which has undergone enormous evolution and vast development in the recent past. It is pertinent to say that we have taken into account this dicta of Supreme Court, which is not only elucidation, but is also in the form of enumeration and laying down of principles.

5(be) One of the aspects that is being contended by the appellants Tatas and Bharti is that it is necessary to hold open house discussion before making subordinate legislations and particularly Regulations in the nature of CLS Co-locations Charges Regulation. It is the specific case of the appellants that the chair person and members of TRAI, which constitute 'Authority' within the meaning of TRAI Act should be present during Open House discussion and interaction should take place. While making the CLS Amendment Regulation and CLS Co-location Charges Regulation dated 19.10.2012 and 21.12.2012 respectively, no open house discussions were held is the complaint/ground of attack of the appellants.

5(bf) In response to above, TRAI is not disputing that the open house discussions were not held with all concerned/stakeholders. In this regard, we are also taking note of the submissions of the three co-respondents i.e., BSNL, RCL and RJIL. To be noted, BSNL and RCL are respondents 2 and 4. RJIL is an intervener. Though we have carefully considered the submissions made by BSNL, RCL and RJIL regarding the procedure adopted by TRAI for making the aforesaid 2012 Regulations i.e., CLS Amendment Regulation and CLS Co-location Charges Regulation, we are of the view that with regard to subordinate legislation making, it is for TRAI to defend the process and it is not for the co-respondents to defend the process. We hasten to add that we are also clear in our minds that there is a distinction between co-respondents supporting subordinate legislation and the co-respondents supporting the sub-ordinate legislation making process.

5(bg) It is also to be noted that these co-respondents, for all practical purposes, along with the appellants i.e., TATAs and Bharti, are competitors in the same industry. Therefore, with regard to subordinate legislation making process, while noticing the submissions of the co-respondents, the thrust of our discussion will be only on the stand taken by TRAI as we are clear in our minds that it is for the subordinate legislation making Authority to defend the process /procedure adopted by it and not for business rivals / competitor entities to do so. At best, they can only be heard to contend that they have no grievance in this regard and they are satisfied with the process. Their submissions are viewed and perceived thus. In this regard, we notice that in support of the subordinate legislation making process, Mr.V.T.Gopalan, learned senior counsel appearing for BSNL submitted that all the concerns of

the stake holders have been taken into account. Mr.Dabal Banerjee, learned senior counsel appearing for RCL submitted that Section 36 of TRAI Act should be read in conjunction with SOR of TRAI Act.

5(bh) It is also the specific contention of Mr.Banerjee that Section 11(1)(b) alone is sufficient to sustain the process and one need not look beyond Section 11(1)(b). It is the further submission of Mr.Dabal Banerjee that the CLS Amendment Regulation and CLS Co-location Charges Regulation are only measures to ensure compliance of terms of licence and therefore cannot be faulted with. Learned senior counsel pressed into service BSNL judgment i.e., BSNL v. Telecom Regulatory Authority of India, (2014) 3 SCC 222 to say that a set of subordinate legislations, particularly those that have been called in question in this matter i.e, impugned Regulations, should be sustained as long as they satisfy the three tests of not being inconsistent with the SOR, not being inconsistent with the Rules and as long as it carries out the purposes of TRAI Act. Paragraphs 89, 90 and 100 of the BSNL case were pressed into service in support of submissions qua testing subordinate legislation. State of Tamil Nadu Vs. Shyam Sundar reported in AIR 2011 SC 3470 was pressed into service and paragraph 54 in the said judgment was adverted to. Learned senior counsel Mr.Venkatraman appearing for RJIL submitted that 16 out of 20 points raised by the appellants have been considered and that the learned single Judge has also dealt with this, he emphasised that CLS continues to be a bottle neck facility. In the light of the view we have expressed supra with regard to co-respondents supporting Regulation making process of TRAI, we are also of the view that the aforesaid submissions are more in the nature of general principles. We deem it necessary to test the impugned Regulations in the light of the points raised and as to whether they have been dealt with. Particularly speaking, the contentions of the appellants on this aspect of the matter is that TRAI has fixed / prescribed uniform charges (with only one specific exception, i.e., Mumbai) ignoring the fact that different determinants come into play for different CLS owners and TRAI has not disclosed the costing methodology. To be noted, lone exception with regard to Mumbai, we are informed, has been made on the basis of space constraint in Mumbai. In other words, on the basis that cost of space and electricity in Mumbai is more in comparison to other places.

5(bi) Elaborate submissions were made by both sides on the points that TRAI has made a fundamental error with regard to capacity utilization and the adoption of 2.6 as conversion factor for assessing cost of higher capacity is wholly

incorrect. As an illustration, one head which according to us is striking is taken up for discussion and that is 'capacity utilisation'. According to TATAs and Bharti, capacity utilisation is an important element/determinant in estimating cost, as this determinant is a percentage of the built capacity and the total cost divided by utilized capacity to arrive at what is known as per unit cost. It is the specific contention of the appellants that 70% capacity utilization has been assumed by TRAI arbitrarily without any basis to do so. Before proceeding to demonstrate how there is no basis for assuming 70% capacity utilization, the appellants made submissions on how an erroneous fixation of capacity utilization can impact the cost factor. It is the specific submission of appellants in this regard that higher utilization capacity, more so, pegged at 70% would mean that cost per unit will get so drastically reduced, making it virtually impossible to function at that rate. In other words, assumption of capacity utilization at 70% increases the denominator enormously in the above said formula owing to which per unit cost gets reduced drastically.

5(bj) Coming back to assuming 70% as capacity utilization, it is the specific case of the appellants that this issue has been raised in the consultation paper and it has been dealt with summarily and in a fleeting manner in the explanatory memorandum. It says that it has been arrived at on the basis of discussions with CLSs, other stakeholders and also by taking into account the data submitted to them by various stakeholders.

5(bk) We deem it appropriate to give our conclusions regarding proposition No.3 along with conclusions for proposition No.6.

5(bl) Proposition No.3, which is being discussed herein would reveal that it pertains to non-conformity with subordinate legislation making process, particularly in the light of subordinate legislation making jurisprudence in its evolved and developed form as it stands today. Proposition No.6 pertains to manifest arbitrariness. Legally speaking both these points are directly traceable to Sub-section (4) of Section 11 of TRAI Act. Therefore, we deem it appropriate to give conclusions for proposition Nos. 3 and 6 together after discussing Proposition No.6.

5(bm) With this, we move on to legal proposition No.4. This legal proposition as propounded and advanced before us is to the effect that the impugned Regulations are inconsistent with Section 36 and Section 11(1) of TRAI Act. With regard to Section 36 of TRAI Act, we have already dealt with the same in

detail while dealing with legal proposition Nos.1 and 2 supra. With regard to Section 11 of TRAI Act, it deals with functions of TRAI. It is the specific submission of TATAs and Bharti that the impugned Regulations are not in conformity with Regulation making powers and the impugned Regulations do not fit into any of the functions of TRAI enlisted and adumbrated in Section 11 of TRAI Act. Though Section 11 only deals with functions of TRAI, it is Section 36 that deals with Regulation making powers of TRAI. We are applying the principle to test whether a particular subordinate legislation is ultra vires/intra vires qua parent Act, which was laid down by the Supreme Court in the celebrated P.Krishnamurthy's case (State Of Tamil Nadu & Anr vs P. Krishnamurthy & Ors) reported in (2006) 4 SCC 517. The principle is, if a subordinate legislation does not fit into any one of the specific sub-sections, it can be traced to sub-section (1) which generally is to the effect that all that is necessary to further the objectives and purposes of the Statute (in this case TRAI Act), can be done.

5(bn) To be noted, normally in all rule making power provisions in statutes sub-section (1) of the rule making power is generic and talks about all that are necessary for furthering the objectives of the statute. In sub-section (2) of the rule making power, there is enumeration with specificity, i.e., the specific heads of rule making power under which the subordinate legislation making Authority is given power to make rules. This is the statutory scheme in most statutes giving rule making power /subordinate regulation making power to other Authorities and it is in this backdrop that the aforesaid test qua ultra vires / intra vires parent Act, was laid down. In the instant case, from the submissions of senior counsel Mr.P.Wilson, it emerges that it is the specific case of TRAI that the impugned Regulations have been made in public interest and therefore, it is certainly in furtherance of TRAI Act.

5(bo) When TRAI makes a submission that the impugned regulations have been made in public interest, it is essentially talking about price fixation. At least two judgments of the Hon'ble Supreme Court touching upon price fixation are of great relevance in this context. One is V.S.Rice and Oil Mills and others Etc. Vs. State of Andhra Pradesh Etc. [(1964) 7 SCR 456] and the other case is Shree Meenakshi Mills Ltd vs Union Of India [(1974) 1 SCC 468]. Both these judgments are Constitution Bench judgments. V.S.Rice Mill case was pressed into service by TRAI and BSNL, whereas Shree Meenakshi Mills case was pressed into service by RCIL.

5(bp) In V.S. Rice Mill case, there was a challenge to the validity of two notifications issued by the State Government under Section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949. Vide notifications, which were subject matter of V.S. Rice Mill case, the tariff for electricity was hiked. Constitution Bench delved into the meaning of 'regulate' and held that it would include increase and decrease of rates. In Shree Meenakshi Mills' case, notifications issued by Textile Commissioner under Essential Commodities Act determining the ex-factory price of yarn was assailed. In this judgment, the Supreme Court held that price control is in the interest of the country as a whole for just distribution of goods and therefore, price control cannot be held to be arbitrary or unreasonable.

5(bq) It was held that the price control made collaterally served the purpose of retaining equilibrium in supply and demand.

5(br) While dealing with propositions 1 and 2, after examining Sections 36 and 11 of TRAI Act together with SOR of the parent Act and SOR of 2000 amending Act, we have held that TRAI does have the function or for that matter a duty in this regard. The reason is, SOR of the parent Act clearly makes reference to National Telecom Policy, 1994, which amongst other things, stresses on achieving universal service, bringing the quality of telecom services to world standards and ensuring provision of a wide range of services to meet the customers' demand at a reasonable price. We have already held as answer to propositions 1 and 2 that the impugned Regulations are traceable to Sub-section (1) of Section 36 read with Section 11 (1) (b) (i) and (iv). Therefore, with regard to proposition No.4, we hold that the impugned Regulations as a whole are not inconsistent with Sections 36 and 11 of TRAI Act as contended. At best, there is an impact on numerical values in Schedules to CLS Co-location Charges regulation and we shall deal with it infra. To be noted, there is one more judgment on price fixation being Shri Malaprabha case. We shall deal with it while examining proposition No.6.

5(bs) This takes us to legal proposition No.5 wherein the appellants before us are canvassing that the learned single Judge fell in error in examining and viewing the whole matter from the perspective that TRAI is an expert body and therefore, judicial review of such Regulation making exercise of TRAI is impermissible.

5(bt) The concept of judicial review, its vistas have been elucidatively explained in a long line of authorities and a catena of judgments over a period of time. We do not deem it necessary to set out those catena of judgments and plethora of elucidations on the scope of judicial review, but it would suffice to say that, by embarking upon judicial review, the Court is not assuming the role of an expert body like TRAI and the Court is not performing the functions of an expert body like TRAI. What is being tested is the vires qua parent Act, validity and constitutionality of subordinate legislation made by TRAI and the subordinate legislation making process. In other words, TRAI besides its advisory and recommendatory functions, performs the role of a statutory authority, which has been delegated and vested with Regulation making power by the parent Act. It is this exercise of Regulation making power of TRAI that is being tested in the instant case. These Regulations, i.e., impugned Regulations are indisputably subordinate legislations. When subordinate legislations are assailed, it is certainly necessary to go into certain details, which according to the subordinate legislation making authority weighed in its mind in the process of making the impugned subordinate legislations. This by itself will not mean that the functions of an expert body are being assumed and performed by the Court. The test applied by the Court is to see if the subordinate legislation is traceable to the parent statute within which subordinate legislation making process should perambulate. Therefore, to this extent, we are not in agreement with the learned single Judge in taking the view that TRAI is an expert body and therefore, judicial review is so limited that the points raised by the appellants cannot be looked into. Answer to proposition No.5 in a nutshell is judicial review qua subordinate legislation making process is permissible and the same has been done, but numerical values arrived at by specialised statutory entity is left to statutory entity to rework the same in the light of lapses we have noticed about which we are dealing with infra.

5(bu) We now move to the last and sixth legal proposition i.e., manifest arbitrariness on the part of TRAI in making the impugned regulations.

5(bv) In the light of the recent judgment of the Supreme Court in Shayara Bano Vs. Union of India reported in (2017) 9 SCC 1, manifest arbitrariness is also one of the facets of infarction of Article 14 of Constitution of India resulting in infarction of an Article in Part III of Constitution of India. Before proceeding further with testing the impugned Regulations in the light of Article 14, it may be necessary to look at

Article 19(6) of Constitution of India. To be noted, it is the specific case of the appellants before us that the impugned Regulations, particularly CLS Co-location Charges Regulation violates the sanctus right to carry on trade or business enshrined in Article 19(1)(g) of Constitution of India. In this regard, sub-article (6) of Article 19 comes into play. In other words, Article 19(6) is an exception to Article 19(1)(g). These aspects of Constitution of India are too very well settled and therefore, we straight away proceed to Article 19(6) of Constitution of India. Sub- Article (6) of Article 19, while carving out an exception to Article 19(1)(g), says that reasonable restrictions can be imposed on the exercise of right conferred under Article 19(1)(g). It is also well settled that for exercise of restraint/restriction under Article 19(6) on the right to practice trade or business, the restraint should satisfy two conditions. One condition is that it should be reasonable restriction and the second condition is that it should be in larger public interest. In the instant case, the CLS Co-location charges Regulation, brings down the rates approved by TRAI in 2007 by as much as 79% to 97%. This, on the face of it, is drastic is appellants' say. Therefore, one has to necessarily examine whether the CLS Co-location charges Regulation satisfies the twin test for qualifying under Article 19(6) of Constitution of India. In other words, a plain reading of the impugned regulations (to be noted, impugned Regulations consists of three regulations) would reveal that the CLS Co-location charges regulation is directly in conflict with the self regulatory regime. Therefore, whether it is reasonable restriction or not needs to be looked into. For this, we again turn to the call drop case. Hon'ble Supreme Court reiterated the test qua Article 19(6) of Constitution of India in the call drop case, cited supra. This is contained in Paragraphs 46 to 48 of call drop case. We deem it appropriate to extract the same. Paragraphs 46 to 48 read as follows: .

"46. Under Article 19(6) of the Constitution, the State has to conform to two separate and independent tests if it is to pass constitutional muster — the restriction on the appellants' fundamental right must first be a reasonable restriction, and secondly, it should also be in the interest of the general public. Perhaps the best exposition of what the expression "reasonable restriction" connotes, was laid down in Chintamanrao v. State of M.P. [Chintamanrao v. State of M.P., 1950 SCR 759 : AIR 1951 SC 118] , as follows: (SCR p. 763 : AIR p. 119, para 7)

"7. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

47. It is interesting to note that the original Constitution, while enumerating various rights under Article 19(1), when it referred to the right of freedom of speech in Article 19(1)(a), laid down in Article 19(2) that any law abridging the right to freedom of speech could only pass constitutional muster if it related to any of the subjects laid down in clause (2). What was conspicuous by its absence was the phrase "reasonable restriction", which was only brought in by the first amendment to the Constitution.

48. Similarly, the first amendment to the Constitution also amended Article 19(6), with which we are directly concerned, to provide for a State monopoly, which would not have to be tested on the ground of reasonable restrictions. Therefore, the first amendment to the Constitution of India has made it clear that reasonable restrictions, added in Article 19(2) and subtracted from Article 19(6) (insofar as State monopolies are concerned), point to the fact that this test is a test separate and distinct from the test of the law being in the interest of the general public. Why we are at pains to point this out is because the learned Attorney General's argument focused primarily on the impugned Regulation being in the public interest. He referred to *Delhi Science Forum v. Union of India* [Delhi Science Forum v. Union of India, (1996) 2 SCC 405], for the proposition that TRAI, as an active trustee, has framed this Regulation for the common good.

While accepting that TRAI may have done so, yet it is important to note that, apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. We cannot forget that when viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Article 14 and Article 19 (1)(g) respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates. Any arbitrary invasion of a fundamental right cannot be said to contain this quality. A proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest."

5(bw) Call drop case in turn drawing inspiration from the celebrated Chintaman Rao Vs. State of M.P. reported AIR 1951 SC 118, has clearly held that the phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of a right should not be arbitrary or excessive in nature beyond what is required in the interest of public. It was also held that the word 'reasonable' implies intelligent care and deliberation, that is, the choice of course which is dictated by reason. In other words, a legislation (to be noted, legislation includes subordinate legislation) which excessively invades the right under Article 19(1)(g) cannot be held to contain the trait of reasonableness. In sum and substance, it should strike an acceptable balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted under Article 19(6) of Constitution of India.

5(bx) While dealing with other legal propositions, we have also dealt with public interest which has been put forth by senior counsel Mr.P.Wilson appearing for TRAI. We have already alluded to supra the obtaining position that we are not dealing with a beneficial legislation. TRAI brought in a self-Regulation mechanism. Subsequently, TRAI brings in a regime prescribing the charges and rates which the CLSs shall charge qua the access seekers. The very fact that these charges which are approved by TRAI under a self regulatory regime have been slashed by 79 to 97% in 2012 shows that it is a huge downward

revision. This takes us to the further question as to whether this by itself will affect the entire subordinate legislation or will impact only the numerical values of the access facilitation charges, annual operation and maintenance charges and co-location charges that have been ultimately arrived at in the CLS Co-location charges regulations. To be noted, what we are examining is whether this impacts the validity of 'impugned regulations' itself or only the numerical values in Schedules to CLS Co-location charges regulations.

5(by) One other issue is as to whether CLS continues to be a bottle neck facility. Much was said about many countries taking a policy decision that CLS is no more a bottle neck facility.

5(bz) A 79% to 97% reduction is no doubt huge and it has to be demonstrated to show that such a drastic cut is reasonable, but this by itself cannot be construed to be an infraction of Article 19(1)(g) or not passing the rigor / muster of Article 19(6) as these impact only the numerical values in the Schedules to CLS Co-location charges regulation.

5(ca) With regard to public interest, TRAI also sets up the plea of res judicata. TRAI argued that res judicata will apply even within one litigation depending on the orders passed at various stages of that litigation.

5(cb) To be noted, in the consultation paper and the material placed before us, there is only a reference to statements made by stakeholders and there is nothing to say as to which specific stakeholder made a particular statement. Not only should the basis be taken on empirically hard facts, it should also be clearly made available and made known to the stakeholders as this is a very essential aspect of transparency. This has also been specifically elucidatively articulated by the Hon'ble Supreme Court in the call drop case.

5(cc) Besides, Article 19(6) of Constitution of India, another provision which is of significance is sub-section (4) of Section 11 of TRAI Act.

5(cd) We have already mentioned, we will be answering proposition Nos.3 and 6 together. Proposition No.3 talks about TRAI not dealing with all the objections and Proposition No.6 deals with manifest arbitrariness especially while dealing with proposition No.3 supra.

5(ce) Call drop case no doubt pertains to another set of Regulations made by TRAI under its Regulation Making Power. While striking down another set of Regulations made by TRAI, Hon'ble Supreme Court in the Call drop case has laid down principles pertaining to Regulation making power and functions of TRAI vide Sections 36 and 11 of TRAI Act. Obviously the same Regulation which had already been struck down by the Supreme Court, cannot be called in question again in a High Court. Therefore, another set of Regulations having been called in question or customers accepting the position that they are responsible for a particular percentage of call drop can be no ground to make call drop case principles inapplicable to instant case. Therefore, to this extent, we are unable to accept the submissions made on behalf of TRAI by senior counsel Mr.P.Wilson that Call drop case is clearly distinguishable on facts and is inapplicable to the instant case.

5(cf) Though the requirements of subordinate legislation making process in its evolved, developed form obtaining today has been discussed supra in this judgment, in the light of capacity utilisation being fixed at 70% becoming a major point of contention besides adoption of conversion factor of 2.6 turning heavily on this aspect of the matter impacting cost hugely, it is deemed appropriate to make some elaboration in this regard. To be noted, conversion factor is a costing methodology, but it is significant in terms of its impact on ultimate figures.

5(cg) As alluded to supra, in the Call Drop case, the Supreme Court has referred to Corpus Juris Secundum. Paragraphs 80 to 91 of Call Drop case have been extracted and reproduced supra. Our understanding of that portion of Corpus Juris Secundum pertaining to rule making requirements is, it is imperative that the rule making body explains how the rule making body resolved a significant problem raised by stakeholders in their comments and as to how the same was resolved leading to the ultimate rule. In fact, it is further explained by saying that a mere conclusory statement is not sufficient. It is clearly laid down that a mere conclusory statement will not fulfil the rule making body's duty to incorporate a concise statement of their basis and purpose. Rule making body should articulate a satisfactory explanation. In our understanding, 'satisfactory explanation' includes explanation regarding rational connection between the facts the rule making body finds and the choices it makes. In this regard, the rule

making body may have to identify specific studies or data that they rely upon in arriving at a decision to adopt a rule and make it the ultimate rule. This is of utmost importance.

5(ch) In the Call Drop case, after referring to the aforesaid aspect of Corpus Juris Secundum, the Supreme Court in a recommendatory tone had exhorted the Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act albeit with certain well defined exceptions, so that all subordinate legislations are subject to transparency process. Supreme Court in Call Drop case has categorically held that TRAI in its explanatory memorandum should clearly set out what they have taken into account, what was actually said and reasons for agreeing or disagreeing with them. Most importantly, a reading of Corpus Juris Secundum, as adapted and adopted by Supreme Court while dealing with Regulation making powers of TRAI under the TRAI Act in Call Drop case would clearly reveal that the law laid down by Supreme Court with regard to the aforesaid aspect of subordinate legislation making and transparency therein is intended to reduce arbitrariness in subordinate legislation making. In fact, Supreme Court has gone as far as saying that this would obviate in many cases the need for persons to approach courts to strike down subordinate legislations on the ground of such legislations being manifestly arbitrary or unreasonable.

5(ci) There is also a clear reference to sub-section 4 of Section 11 of TRAI Act, wherein transparency has been specifically built into Regulation making process of TRAI. It gives a statutory basis for transparency even without a legislation akin to US Administrative Procedure Act which the Supreme Court has recommended and exhorted the Parliament to make. It also gains a statutory basis and statutory status even without a Federal Administrative Procedure Act on the teeth of which the elucidation in Corpus Juris Secundum has been made.

5(cj) Therefore, to put it in simple and straight terms, whenever TRAI makes Regulations by exercise of its Regulation making power under Section 36 of TRAI Act, the same should be absolutely transparent and this transparency is imperative to avoid arbitrariness. Manifest arbitrariness, subordinate legislation becoming unreasonable and the need of Courts to step in and strike down such legislations have all been inseparably dovetailed with transparency in subordinate legislation making by TRAI. It has been so dovetailed by the ratio of Hon'ble Supreme Court in the Call Drop case.

5(ck) Before proceeding further, it is to be noted that in the absence of a legislation akin to US Administrative Procedure

Act and the Federal Administrative Procedure Act, Supreme Court in its wisdom and considered opinion has found that a procedure for exercise of such powers has been set out statutorily in the Airport Economic Regulatory Authority of India Act, 2008 (Section 13 of the said Act, to be precise) and has clearly held that this Section 13 of the aforesaid At is a good working test for transparency referred to in sub-section 4 of Section 11 of TRAI Act.

5(cl)A close scrutiny of Hon'ble Supreme Court's reading of aforesaid Section 13(4) into TRAI Act and particularly into Section 11(4) of TRAI Act, in our understanding means that whenever TRAI exercises its Regulation making functions under Section 36 of TRAI Act, it has to follow and ensure three requirements. Those three requirements are (a) holding due consultation with all stakeholders, (b) allowing all stakeholders to make their submissions and (c) making all decisions fully documented and explain the same. When sub-section 4 of section 11 of TRAI Act lays down that they shall ensure transparency while exercising it's powers, it precisely means that aforesaid three requirements should be met. This Court has no doubt in its mind that it is the law laid down by Supreme Court in Call Drop case. To be noted, law laid down qua TRAI's Regulation making power under TRAI Act.

5(cm)Therefore, the complaint of Bharti and TATAs that TRAI has not fully documented and explained the reasons and as to what weighed in its mind for adopting 70% as utilisation factor has to be tested on the basis of the above touchstone culled out from Corpus Juris Secundum as in Call Drop case. Equally, the adoption of 2.6 as conversion factor as part of costing methodology and the complaint of Bharti and TATAs that it should have been 4 also has to be tested in the above touchstone. In other words, TRAI should have fully documented and explained as to why conversion factor of 4 is unacceptable and as to why 2.6 is more acceptable and appropriate.

5(cn)We examined the explanatory memorandum in the light of submissions made before us.

5(co)With regard to utilisation factor of 70%, TRAI has merely documented that on the basis of discussion with owners of CLSSs and other stakeholders and also taking into account data supplied to it by various stakeholders, the utilisation factor of 70% has been taken into account. In the hearing, TRAI was unable to point out that there is anything more in this regard in the explanatory memorandum. The Court asked itself the question as to whether the aforesaid reason is a good explanation and as to whether it satisfies the requirements in

the light of the touchstone for testing the same which we have culled out and set out supra. We have no difficulty in coming to the conclusion that it does not satisfy the requirement. All that TRAI has said is that the basis is discussions with owners of CLSs and other stakeholders and data submitted by such owners of CLSs and other stakeholders have been taken into account. What exactly was the discussion and what is the basis on which TRAI pegged it at 70% is not explained. In other words, explanatory memorandum is silent on this aspect of the matter.

5(cp) One more very interesting aspect of the matter being projected and brought into sharp focus before us by TATAs and Bharti was that stakeholders includes access seekers. Access Seekers will obviously be interested in bringing down the cost by showing an enhanced utilisation factor. Therefore, to say that they have taken data given by stakeholders as the basis without any explanation is unacceptable. The argument of appellants that the explanatory memorandum is bereft of any explanation in this regard is acceptable. Bharti and TATAs also point out before us that Reference Interconnect Offers (RIO) filed in 2007, 2010 and 2012 showed far lesser capacity utilisation factor and there is no explanation whatsoever for this sudden jump.

5(cq) With regard to conversion factor being pegged at 2.6%, it is the specific case of Bharti and TATAs before us that as according to them, conversion factor should be 4. Though this is only a part of costing methodology as it has huge impact in terms of numbers qua costing, this has been projected before us. In the explanatory memorandum, all that TRAI has said is that the price of STM 1 will be very low and price of STM 64 will be on higher side which will not provide advantage of scale of economy for higher capacities. This, in sum and substance, is the explanation given by TRAI in the explanatory memorandum. However, the appellants before us point out that the capacity for access facility is sold at four different levels, i.e., STM 1, STM 4, STM 16 and STM 64 depending upon the requirement of access seeker. It is also the specific case of appellants that it is sold at four such levels depending upon the requirement of a particular access seeker. Appellants also pointed out that in response to the consultation paper, they have clearly explained and pointed out that cost of STM 1 and STM 4 are equivalent, cost of STM 16 is 4 times that of STM 4, besides the cost of STM 64 correspondingly being 4 times the cost of STM 16. It is the specific case of appellants that it is on this basis that they contend that conversion factor should have been 4. Thereafter, merely saying that adoption of conversion factor of 4 will make the price of STM low and put the price of STM 64 on

higher side tantamounts to begging the question is appellants' say. In other words, it does not answer the question much less does it explain why TRAI has preferred 2.6 to 4 as conversion factor. There is a mere reference to advantage of scale of economy for higher capacities. Merely saying that this is generally agreeable to most of the stakeholders, in our considered opinion does not satisfy the specific requirement of fully documenting and explaining transparently, which is imperative. According to appellants, these two aspects of the matter make a huge difference to the ultimate Rule / cost. Though it is the contention of the appellants that the assumption of capacity utilisation at 70% and the conversion factor at 2.6 without adequate basis affects the very basis of the impugned regulations, on a close and careful scrutiny, we find that this has at best impacted only the numerical values of access facilitation charges, annual operation and maintenance charges and co-location charges contained in Schedules I, II and III of the CLS Co-location Charges regulations. TRAI has to necessarily relook, rework and redo these values in the CLS Co-location charges regulations after following the transparency, principles of natural justice and other parameters that operate in the field of subordinate legislation making jurisprudence as obtaining today.

5(cr) Both the appellants before us made elaborate submissions to show that the capacity utilization cannot be 70% at any point of time. We are not concerned with the correctness or otherwise of these numbers. We are not going into the arena of what exactly should have been the capacity utilisation and conversion factors qua numerical values. Therefore, on this ground, the numerical values of the three charges in the CLS Co-location regulation charges are certainly hit by the vice of both lack of transparency and arbitrariness. However, we are of the view that this does not render the entire impugned regulations invalid or hit by aforesaid vices. Equally, TRAI assigning capacity utilisation to be 70% without any basis (much less logical basis) or sequence to support the same clearly shows that the fixation of capacity utilisation at 70% is arbitrary. Therefore, in dealing with an answer to propositions 3 and 6, we hold in favour of the appellants that the numerical values of the three charges in the Schedules to CLS Co-location regulation charges are hit by the vices of lack of transparency and manifest arbitrariness. We also hold that the process and procedure for making subordinate legislation in its evolved and advanced form as it stands today has not been followed qua numbers in aforesaid Schedules, but this by itself does not render the impugned regulations invalid is our considered view. To be noted, it is not merely the process and

procedure of subordinate legislation making in its evolved and advanced form as it stands today, but transparency that has been built into the very statute and the very provision of TRAI Act to which the impugned regulations are traceable has been breached qua aforesaid Schedules and numerical values therein. To be precise, it is traceable to sub-section 4 of Section 11 of TRAI Act, which has been alluded to supra. In this view of the matter, though this 70% capacity utilisation and 2.6 conversion factor does not affect the impugned regulations as a whole, the numerical values of the three charges adumbrated in the three schedules to CLS Co-location charges regulations have to necessarily be reworked and redone in conformity with these parameters for subordinate legislation making. Considering the scope of powers of TRAI, CLS not qualifying as interconnection (owing to absence of one out of six determinants) does not denude the powers of TRAI as it is nobody's case that interconnection is covered / regulated by another separate statute or regime. This answers proposition No.1 along with proposition Nos.3 and 6.

6.Catalogue of Case Laws:

6(a) A large number of case laws were pressed into service. We are constrained to say that multiple case laws for the same proposition have not served or aided focus on core issues that make up the crux and gravamen of this lis. However, for the purpose of capturing the trajectory of the hearing before us as comprehensively and as accurately as possible with specificity, we deem it appropriate to catalogue the case laws that were cited /placed before us by various parties to this lis.

6(b) Though we are cataloguing all the case laws that were pressed into service, as already mentioned supra, we have referred to and discussed only those case laws, which in our opinion, are imperative to support our conclusions and absolutely essential for our discussions supra.

6(c) Case laws placed before us by the two appellants i.e, TATAs and Bharti are as follows:

1.Board of Trustees of Martyrs Memorial Trust and another Vs. Union of India and others [(2012) 10 SCC 734].

2.State of Uttaranchal Vs. Sunil Kumar Vaish [(2011) 8 SCC 670].

3.Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers [(2010) 4 SCC 785]

4.Director, Horticulture, Punjab and others Vs. Jagjivan Parshad [(2008) 5 SCC 539]

5.Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others [(2016) 7 SCC 703];

6.Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India and others [(2014) 3 SCC 222] ;

7.Ajay Singh and another Vs. State of Chhattisgarh and another [(2017) 3 SCC 330];

8.Union of India Vs. Association of Unified Telecom Service Providers of India and others [(2011) 10 SCC 543];

9.State of Tamil Nadu Vs. Mahi Traders [(1989) 1 SCC 724];

10.P.Kasilingam and others Vs. P.S.G. College of Technology and others [1995 Supp (2) SCC 348];

11.Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and others [(2001) 4 SCC 139];

12.R.Venkataswami Naidu and another Vs. Narasram Naraindas alias Purushottamdas [AIR 1966 SC 361];

13.V.Sudeer Vs. Bar Council of India and another [(1999) 3 SCC 176].

14.Indian Council of Legal Aid & Advice and others Vs. Bar Council of India and another [(1995) 1 SCC 732]

15.Mahanagar Telephone Nigam Ltd. Vs. Telecom Regulatory Authority of Delhi [AIR 2000 Del 208] (DB)

16.Kunj Behari Lal Butail and others Vs. State of H.P. and others [(2000) 3 SCC 40];

17.Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and others [(2006) 4 SCC 327];

18.Utah Construction & Engineering Pty. Ltd. and another Vs. Pataky [1965] 3 All E.R. 650;

19.Nair Service Society Vs. Dr.T.Beermasthan and others [(2009) 5 SCC 545];

20.Gurudevdatla VKSSS Maryadit and others Vs. State of Maharashtra and others [(2001) 4 SCC 534];

21.The Tata Engineering and Locomotive Company Ltd. Vs. The Gram Panchayat, Pimpri Waghere [(1976) 4 SCC 177];

22.Gulati and Company Vs. Commissioner of Sales Tax, Uttar Pradesh, Lucknow [(2014) 14 SCC 286];

23.Union of India and another Vs. Delhi Cloth and General Mills Co. Ltd. [AIR 1963 SC 791];

24.Dadi Jagannadham Vs. Jammulu Ramulu and others [(2001) 7 SCC 71];

25.Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India [Appeal Nos.8 and 9 of 2007, before TDSAT, New Delhi], dated 23.1.2009;

26.N.K.Bajpai Vs. Union of India and another [(2012) 4 SCC 653];

27.Coimbatore District Central Cooperative Bank Vs. Coimbatore District Central Cooperative Bank Employees Assn. and another [(2007) 4 SCC 669];

28.Godawat Pan Masala Products I.P. Ltd. and another Vs. Union of India and others [(2004) 7 SCC 68];

29.Kumari Shrilekha Vidyarthi and others Vs. State of U.P and others [(1991) 1 SCC 212];

30.Delhi Science Forum and others Vs. Union of India and another [(1996) 2 SCC 405];

31.East Coast Railway and another Vs. Mahadev Appa Rao and others [(2010) 7 SCC 678];

32. West Bengal Electricity Regulatory Commission Vs. CESC Ltd. [(2002) 8 SCC 715];

33. Indian Express Newspapers (Bombay) Private Ltd. And others Vs. Union of India and others [(1985) 1 SCC 641];

34. Shri Malaprabha Coop. Sugar Factory Ltd. Vs. Union of India and another [(1994) 1 SCC 648];

35. Dai-Ichi Karkaria Ltd. Vs. Union of India and others [(2000) 4 SCC 57];

36. Gullapalli Nageswara Rao and others Vs. Andhra Pradesh State Road Transport Corporation and another [AIR 1959 SC 308];

37. Union of India and others Vs. Jai Prakash Singh and another [(2007) 10 SCC 712];

38. Rama Varma Bharathan Thampuram Vs. State of Kerala and others [(1979) 4 SCC 782];

39. Gora Lal Vs. Union of India [(2003) 12 SCC 459];

40. Organo Chemical Industries and another Vs. Union of India [(1979) 4 SCC 573];

41. BSES Ltd. Vs. Tata Power Co. Ltd. and others [(2004) 1 SCC 195];

42. Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and others [(1974) 2 SCC 402];

43. Oil and Natural Gas Commission and another Vs. Association of Natural Gas Consuming Industries of Gujarat and others [1990 (Supp) SCC 397];

44. U.P. State Road Transport Corporation Vs. State of U.P. and another [(2005) 1 SCC 444];

45. C.V. Rajendran and another Vs. N.M. Muhammed Kunhi [(2002) 7 SCC 447];

46. Bhanu Kumar Jain Vs. Arhana Kumar and another [(2005) 1 SCC 787];

47.Jagmittar Sain Bhagat and others Vs. Director, Health Services, Haryana and others [(2013) 10 SCC 136];

48.Petroleum and Natural Gas Regulatory Board Vs. Indraprastha Gas Limited and others [(2015) 9 SCC 209];

49.Vodafone India Ltd and others Vs. Telecom Regulatory Authority of India [Manu/DE/2883/2017] (LPA 592/2017, AV 809/2017 and CM Nos.33165-33166/2017, dated 20.9.2017).

6(d) Case laws pressed into service by TRAI (Respondent No.1) are as follows:

1.Avishek Goenka Vs. Union of India and another [(2012) 5 SCC 275];

2.Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India and others [(2014) 3 SCC 222];

3.Star India P. Ltd. Vs. Telecom Regulatory Authority of India and others [(2008) 146 DLT 455 (DB)];

4.Uttar Pradesh Power Corporation Limited Vs. National Thermal Power corporation Limited and others [(2011) 12 SCC 400];

5.Rohtas Industries Ltd. and others Vs. Chairman, Bihar State Electricity Board and others [1984 (Supp) SCC 161];

6.Transmission Corporation of Andhra Pradesh Limited and another Vs. Sai Renewable Power Private Limited and others [(2011) 11 SCC 34];

7.Bhatia International Vs. Bulk Trading S.A. and another [(2002) 4 SCC 105];

8.M/s.Girdhari Lal and Sons Vs. Balbir Nath Mathur and others [(1986) 2 SCC 237];

9. Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and others Vs. Director General of Civil Aviation and others [(2011) 5 SCC 435];

10. Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others [(2016) 7 SCC 703];

11. Public Services Tribunal Bar Association Vs. State of U.P. and another [(2003) 4 SCC 104];

12. N.K. Bajpai Vs. Union of India and another [(2012) 4 SCC 653];

13. Bachan Singh Vs. State of Punjab [(1980) 2 SCC 684];

14. R.S. Rekha Chand Mohota Spinning & Weaving Mills Ltd. Vs. State of Maharashtra [(1997) 6 SCC 12];

15. Krishi Utpadan Mandi Samiti and another Vs. M/s. Shankar Industries and others [1993 Supp (3) SCC 361 (II)];

16. Nagubai Ammal and others Vs. B. Shama Rao and others [AIR 1956 SC 593];

17. C. Beepathamma and others Vs. Velasari Shankaranarayana Kadambolithaya and others [AIR 1965 SC 241];

18. Roshan Lal Ahuja, In Re [1993 Supp (4) SCC 446];

19. Ajay Kumar Pandey, Advocate, In Re. [(1998) 7 SCC 248];

20. In Re. Ajay Kumar Pandey [(1996) 6 SCC 510].

21. Bharti Airtel Limited Vs. Union of India [(2015) 12 SCC 1];

22. Senior Electric Inspector and others Vs. Laxminarayan Chopra and another [AIR 1962 SC 159];

23. State of Bihar Vs. Mangal Sao [AIR 1963 SC 445];

24.Roop Lal Makkar Vs. Union of India and others [ILR (1973) II Delhi 130];

25.Sanjeev Coke Manufacturing Company Vs. M/s.Bharat Coking Coal Limited and another [(1983) 1 SCC 147];

26.Hinsa Virodhak Sangh Vs. Mirzapur Moti Kuresh Jamat and others [(2008) 5 SCC 33];

27.University Grants Commission and another Vs. Neha Anil Bobde (Gadekar) [(2013) 10 SC 519];

28.Health for Millions Vs. Union of India and others [(2014) 14 SCC 496];

29.M/s.New Bihar Biri Leaves Co. and others Vs. State of Bihar and others [(1981) 1 SCC 537];

30.Sundeeep Kumar Bafna Vs. State of Maharashtra and another [(2014) 16 SCC 623];

31.Villupuram Market Committee Vs. K.Sekar [(2007) 3 MLJ 666];

32.State of T.N. and another Vs. P.Krishnamurthy and others [(2006) 4 SCC 517];

33.Aspen Highlands Skiing Corporation Vs. Aspen Skiing Company [738 F.2d 1509];

34.Norman F.Hecht Vs. Pro Football Inc. [570 F.2d 982];

35.V.S.Rice and Oil Mills and Others etc. Vs. State of Andhra Pradesh etc. [AIR 1964 SC 1781];

36.Indian Express Newspapers (Bombay) Private Ltd. And others Vs. Union of India and others [(1985) 1 SCC 641];

37.Arasmeta Captive Power Company Private Limited and another Vs. Lafarge India Private Limited [(2013) 15 SCC 414];

38.Bihar MICA Exporters Association Vs. State of Jharkhand and others [2012 (3) J.L.J.R. 319];

39.State Bank of India Vs. Santosh Gupta and others [(2017) 2 SCC 538];

40.Deepak Theatre, Dhuri Vs. State of Punjab and others [1992 Supp (1) SCC 684];

41.Tamil Nadu Nursery, Matriculation and Higher Secondary Schools Association (Regd.) Vs. The State of Tamil Nadu and others [2010 (4) CTC 353];

42.Commissioner of Income Tax Vs. Bhandari Machinery Co. (P) Ltd. [72 (1998) DLT 42];

43.State of Tamil Nadu and others Vs. K.Shyam Sunder and others [(2011) 8 SCC 737];

44.Printers (Mysore) Ltd. and another Vs. Asstt. Commercial Tax Officer and others [(1994) 2 SCC 434];

45.P.V.Sivarajan Vs. Union of India and another [AIR 1959 SC 556];

46.Union of India and another Vs. Cynamide India Ltd. and another [(1987) 2 SCC 720];

47.Shree Sidhbali Steels Limited and others Vs. State of Uttar Pradesh and others [(2011) 3 SCC 193];

48.Ichchapur Industrial Cooperative Society Ltd. Vs. Competent Authority, Oil & Natural Gas Commission and another [(1997) 2 SCC 42];

49.Indian Handicrafts Emporium and others Vs. Union of India and others [(2003) 7 SCC 589].

6(e) Case laws cited by BSNL (Respondent No.2) are as follows:

1.Har Shankar and others Vs. The Dy. Excise and Taxation Commissioner and others [(1975) 1 SCC 737];

2.R.K.Garg Vs. Union of India and others [(1981) 4 SCC 675];

3.Prabodh Verma and others Vs. State of Uttar Pradesh and others [(1984) 4 SCC 251];

4. Supreme Court Employees' Welfare Association Vs. Union of India and another [(1989) 4 SCC 187];

5. Shri Sitaram Sugar Company Limited and another Vs. Union of India and others [(1990) 3 SCC 223];

6. Transmission Corporation of Andhra Pradesh Limited and another Vs. Sai Renewable Power Private Limited and others [(2011) 11 SCC 34];

7. Uttar Pradesh Power Corporation Limited Vs. National Thermal Power Corporation Limited and others [(2011) 12 SCC 400];

8. Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India [(2014) 3 SCC 222];

9. Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others [(2016) 7 SCC 703].

6(f) Case laws placed before us by RCL (Respondent No.4) are as follows:

1. Biswambhar Singh and others Vs. State of Orissa and another [AIR 1954 SC 139];

2. In re: The Kerala Education Bill, 1957 [AIR 1958 SC 956];

3. Kunj Behari Lal Butail and others Vs. State of H.P. and others [(2000) 3 SCC 40];

4. A.V. Nachane and another Vs. Union of India and another [(1982) 1 SCC 205];

5. V.S. Rice and Oil Mills and Others etc. Vs. State of Andhra Pradesh etc. [AIR 1964 SC 1781];

6. Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India [(2014) 3 SCC 222];

7. Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others [(2016) 7 SCC 703];

8.Om Prakash and others Vs. State of U.P and others [(2004) 3 SCC 402];

9.Peerless General Finance and Investment Co. Limited and another Vs. Reserve Bank of India [(1992) 2 SCC 343];

10.Prof. Yashpal and another Vs. State of Chhattisgarh and others [(2005) 5 SCC 420];

11.Samee Khan Vs. Bindu Khan [(1998) 7 SCC 59];

12.Shree Meenakshi Mills Ltd. Vs. Union of India [(1974) 1 SCC 468];

13.Anakapalle Co-op. Agrl. & Industrial Society Ltd., etc. Vs. Union of India and others [AIR 1973 SC 734].

6(g) Case law placed before us by RJIL (intervener) is as follows:

20th Century Finance Corpn. Ltd. and another Vs. State of Maharashtra [(2000) 6 SCC 12].

7.Discussion of Case Laws :

(i)Association of Service Provider's case arose out of a judgment of TDSAT, Delhi. The facts of the case are, as per the National Telecom Policy, 1994, Union of India amended the license agreement to move towards revenue sharing fee from fixed license fee. Licensee challenged the validity before TDSAT and TDSAT held against Union of India as no effective consultation was made. On appeal to Hon'ble Supreme Court, Supreme Court set aside the judgment of TDSAT holding that license under Section 4 (1) of the Telegraph Act is a contract and TRAI's recommendations with respect to license agreement are not binding and the decision of the Government will prevail.

(ii)Mahanagar Telephone Nigam Limited's case arises from a Delhi High Court judgment, where petitioner therein challenged the Telecommunication Interconnection (Charges and Revenue Sharing First Amendment) Regulation, 1991 and Telecommunication Tariff (5th Amendment) Order stating that TRAI does not have power to issue the regulations / tariff order. A Division Bench of Delhi High Court quashed the regulations / tariff order and

set aside the same, laying down that certain sections of TRAI Act are only recommendatory / advisory and even the Central Government is not bound to follow the advice. The licensing power is a statutory power, which cannot be impliedly interfered with or subjugated to another authority. Hence TRAI cannot interfere with license terms. It was further held that the power to issue directions is only to the service provider and the Central Government while acting as a licensor is not acting in the capacity of service provider. However, in this case in Paragraph 37 it has been laid down that TRAI has power to fix prices for telecommunication services and we deem it appropriate to extract Paragraph 37:

37. Our above interpretation is also fortified by the fact that all the functions provided for under S. 11(1) and all the powers given to the Authority under S. 11(1) are only in respect of the service provides. Similarly, the powers given under S. 12 and the power to issue direction under S. 13 are also restricted only to a service provider. There is only one provision in the said Act which permits the Authority to issue an order, which would be binding even on the Central Government not acting as a service provider i.e. S. 11(2). Section 11(2), is a specific provision which permits the Authority to notify by an order, the rates on which telecommunication services are to be provided within India and outside India, including the rates on which messages are to be transmitted. This is a specific power which has been conferred on the Authority. It is significant that when this power is conferred, it is not restricted qua service providers. This power can be exercised even over Central Government. It must be mentioned that most of the licenses issued by the Government already provide that rates would be varied. Thus this power can be exercised without it being necessary to provide that it can be exercised "Notwithstanding any contract or decree or order of Court." Thus, when the Legislature intended to give to the Authority a power which was not to be merely recommendatory power but a directory power, the Legislature has done so specifically. Under S. 11(1)(c), (d), (e), (g), (h), (i), (j) etc. no such specific power to override decisions of the Central Government has been conferred on the Authority.

To be noted, we make it clear that power of TRAI to fix prices for telecommunication services will not be denuded and there shall be no invasion of such powers of TRAI as long as the activities for which price is fixed are not covered by another statute under which there is a separate mechanism and in a separate regime.

(iii) BSNL Vs. TRAI [Appeal No.8 and 9 of 2007] case pressed into service by appellant arose from TDSAT, Delhi, where BSNL and MTNL filed an appeal challenging the Domestic Leased Circuit Regulation, 2007 issued by TRAI. TDSAT set aside the regulation as they are arbitrary and without jurisdiction. It dealt with definition of the term 'interconnection' and held that 'interconnection' is intended to enable one set of customers to have access to another set of customers.

(iv) Coimbatore District Central Cooperative Bank case cited by appellant arose from a decision of a Division Bench of Madras High Court, wherein labour disputes arose between the parties and the trade union went on strike. In subsequent disciplinary enquiry, the plea of the workmen was rejected. The Labour Court dismissed the demand of the workmen. From Labour Court, when the matter was carried to High Court, a learned Single Judge, set aside the order of the labour court and directed the arrears in salary to be paid. On appeal to the Division Bench, the Division Bench merely modified the order of the learned single judge and held that interest should not be paid. On appeal to the Supreme Court, the appeal was disposed of and Hon'ble Supreme Court did not interfere with the order of the Division Bench. Supreme Court discussed the aspects of doctrine of proportionality in a decision making process and held that proportionality concerns with process, method or manner of decision making and also decision making should consist of all relevant factors and considerations in the case.

(v) Delhi Science Forum case pressed into service by appellant arose from a petition under Article 32 of Constitution of India wherein the petitioners were questioning the power of the Government to grant license to different non governmental companies to establish and maintain telecommunications systems. Hon'ble Supreme Court dismissed the petition and held that TRAI is an essential authority for growth of the telecom sector and needs to act as a trustee for public good.

(vi) West Bengal Electricity Regulatory Commission was cited by appellant, which arises from the Calcutta High Court, where the West Bengal Electricity Regulatory Commission by tariff order determined the tariff for sale of electricity. The

respondent Company filed an appeal to the High Court under Section 27 of the Act. The Calcutta High Court allowed the appeal and redetermined the tariff. On appeal to Hon'ble Supreme Court, Supreme Court allowed the appeal in part and remitted the matter back to the Commission to be determined by law. Supreme Court held that when a statute confers a right which is in line with natural justice, one cannot take it away.

(vii) Indian Express Newspaper case was cited by both appellants and TRAI. In this case, the petitioners are companies which carry on business of editing, printing and publishing newspaper. They buy newsprint, which is imported from abroad. The petitioners challenged the validity of imposition of import duty on newsprint under Section 12 of Customs Act before Hon'ble Supreme Court invoking Article 32 of Constitution of India, contending that it violated Article 19(1)(a) of Constitution of India. Hon'ble Supreme Court allowed the petition by laying down the test for subordinate legislation. A subordinate legislation can be questioned on the grounds that (a) it is contrary to some statute and (b) it is unreasonable in the sense of being manifestly arbitrary. Supreme Court further held that a subordinate legislation can be struck down if it fails to take into account vital facts which are required to be taken into account by the statute or Constitution. Subordinate Legislation do not enjoy the same immunity as statute.

(viii) Petroleum and Natural Gas case cited by appellants arose from Delhi High Court. Respondent in that case approached the Delhi High Court invoking Article 226 of Constitution of India assailing the order of the appellant therein determining the network tariff and compression charges for CNG. A Division Bench of Delhi High Court held that the appellant is not empowered to fix or regulate the MRP at which gas is sold. On appeal, Hon'ble Supreme Court also held that the appellant does not have any power to fix MRP and dismiss the appeal. Supreme Court further held that if power to frame regulations does not flow from the Act, the delegated authority cannot frame the regulation. The regulatory provisions have to be applied based on nature and text of the Act.

(ix) Vodafone India Ltd. case pressed into service by appellant arose from a Division Bench of Delhi High Court, wherein Vodafone based on consultation paper on review of Interconnection Usage Charges ('IUC' for brevity) requested TRAI for cost model of IUC. After many exchanges between the parties, the same was not given. So, Vodafone filed a writ petition before learned Single Judge of Delhi High Court, who had dismissed the petition. On appeal, Division Bench also dismissed

the writ appeal and held that TRAI's inaction is not violative of its transparency mandate under Section 11(4) of TRAI Act. Division Bench laid down the proposition that decision making process for subordinate legislation may involve consideration of complex factors, necessitating extensive consultations with stakeholders. It also held that transparency has three elements as stated by Supreme Court, (i) Consultation, (ii) all stakeholders to make submissions and (iii) all decisions should be documented.

(x) Avishek Goenka case was cited by TRAI. Petitioner in this case filed a petition under Article 32 of Constitution of India before Hon'ble Supreme Court, contending that norms of issuing calling cards was violated by service providers and as there is no verification method for the same, Supreme Court partly allowed the petition and constituted a committee to look into the same. Hon'ble Supreme Court held that the Government of India and TRAI have to attain a delicate balance of interest between relevant instruction and guidelines. The purpose of TRAI is to develop, facilitate competition and promote efficiency in Telecom sector. Supreme Court further held that the regulatory regime is expected to fully regulate and control all activities in this sphere. Finally, Supreme Court held that Courts should not examine merits of the policy and that is best left to experts. However, the Court can direct the body to consider the matter by law.

(xi) Star Vs. TRAI case cited by TRAI arose from Delhi High Court, wherein the petitioner challenged proviso to Section 2(1) (k) of the TRAI Act, tariff orders dated 15.01.2004, 01.10.2004, 01.12.2004 and 29.11.2005 and the Telecommunication (Broadcasting in Cable Services) Interconnection Regulation, 2004, as TRAI is not competent and the tariff order is violative of Article 14 and 19(1)(a) of Constitution of India. Division Bench of Delhi High Court dismissed the writ petition. The Division Bench held that TRAI has authority and competence of tariff fixation with respect to broadcaster. It also held that TRAI has clearly demarcated functions first advisory and second regulatory. Enlarging will not include terms of interconnectivity between service providers.

(xii) In Bharti Airtel case cited by TRAI, the appellant was a licensee whose license was about to expire and subject to renewal. However, after the 2G case, Union of India took steps to conduct auction of 900 Mhz band insofar as it pertains to licenses coming to an end. This decision was challenged before TDSAT and TDSAT rejected the same. On appeal to Hon'ble Supreme Court, Supreme court dismissed the appeal and held that mode of

distribution and natural resources is best left to executive and court shall not interfere. It also held that when there is conflict between obligation flowing from contract and obligation under law, obligation under law will take precedence as the license granted under Section 4 of the Indian Telegraph Act is a contract between the government and the licensee.

(xiii) Norman F. Hecht case cited by TRAI has arisen from the Court of Appeal of District of Columbia Circuit. This case pertains to private anti-trust action, where the plaintiff was unable to get an American Football league franchise due to restrictive covenant in the lease. The Court laid down the ratio for essential facility. It held that essential facility doctrine which is also called as bottleneck principle are facilities which cannot be practically duplicated and those in possession must allow them to be shared on fair terms. It is an illegal restraint of trade to foreclose the scarce facility.

(xiv) Tamil Nadu Nursery Matriculation case cited by TRAI arose from a Division Bench of Madras High Court. The writ petitioners challenged the validity of the Tamil Nadu Schools (Regulation of Collection of Fees) Act, 2009. The Madras High Court upheld the validity of the Act, but held Section 11 to be ultra vires to Article 14 of Constitution of India. All the petitions were disposed of. The Division Bench held that the Committee under the Act will only intervene if it finds that the fee structure is exorbitant or for profiteering. The private institutions must be given liberty to specify the fee structure.

(xv) Cynamide India case cited by TRAI arises from Hon'ble Supreme Court where the Central Government issued the Drugs (Prices Control) Order, 1979, thereby issuing notification to fix the maximum price at which drugs can be sold. The Delhi High Court quashed the notification on the ground that principles of natural justice are violated. Supreme Court allowed the appeal by the Union of India by holding that stay of notification should not be given and the interest of public should come first. It also held that profiteering should not be the aim. Supreme Court finally held that a subordinate body can make such enquiry as it deems fit before making subordinate legislation. The extent of enquiry is at the discretion of the subordinate body and it cannot be called into question as provision for enquiry is only an enabling provision.

8 Conclusion :

(a) Owing to the discussion and narrative supra, we hold that CLS Regulations and CLS Amendment Regulations are not ultra vires the parent Act, i.e., TRAI Act and the same need not be struck down / quashed. In other words, CLS Regulations and CLS Amendment Regulations are sustained.

(b) However, with regard to utilisation factor being taken as 70% and the conversion factor being fixed at 2.6, we hold that the same breach the requirement of transparency and natural justice principles which are non negotiable ingredients of subordinate legislation making, besides being built into sub-section 4 of Section 11 of TRAI Act. The reasons have been articulated with elaboration supra. However, this has a direct impact only on the access facilitation charges, annual operation and maintenance charges and co-location charges contained in Schedules I, II and III of the CLS Co-location Charges regulations. As a sequittur, these three schedules deserve to be quashed.

(C) TRAI shall redo and re-enact aforesaid Schedules I, II and III of the CLS Co-location charges regulation within a period of six months from the date of receipt of a copy of this order after following all the ingredients and determinants for subordinate legislation making, particularly, transparency and principles of natural justice which have been built into sub-section 4 of section 11 of TRAI Act.

(d) With regard to regulation 5 of the CLS Co-location charges regulation, the access facilitation charges, annual operation and maintenance charges and co-location charges cannot remain static for ever, but review under regulation 5 of CLS co-location charges regulation as and when it is done, shall be in accordance with transparency and natural justice principles.

9 Decision :

(a) Both appeals are partly allowed. We partly confirm the dismissal of writ petitions, W.P.Nos.1875 and 3652 of 2013. We confirm the dismissal of the writ petitions insofar as it pertains to challenge to 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007, i.e., 'CLS Regulation' and 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012, i.e., 'CLS Amendment Regulation'.

(b) Insofar as dismissal of the aforesaid writ petitions qua 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012, i.e., 'CLS Co-location Charges Regulation' is concerned, we partly set aside the same holding that Schedules I, II and III of 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 stand quashed.

(c) TRAI shall redo and re-enact the aforesaid quashed schedules, i.e., schedules I, II and III of 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 after strictly following the procedure for subordinate legislation making, particularly transparency and principles of natural justice which have also been built into section 11(4) of TRAI Act within six months from the date of receipt of a copy of this order.

(d) Consequently, 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007, 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012 and The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 are kept in abeyance for a period of six months from the date of receipt of a copy of this order or redoing / re-enacting aforesaid Schedules whichever is earlier.

(e) Writ appeals are partly allowed to the limited extent set out supra. Considering the nature of the matter and trajectory of the hearings, parties are left to bear their respective costs. Consequently connected miscellaneous petitions are closed.

* (Annexure Enclosed)

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

gpa/vvk

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